

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

MAY 16 2011

RECEIVED MAY 20 2011

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 02/14/2011. 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,



Carol E. Adams
Hearing Representative

PAUL H 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 _____, claimant; Employed by the _____; Case number _____ A hearing was held on February 14, 2011.

The issue for determination is whether the claimant has submitted sufficient evidence to support he was disabled from working from January 6, 2007 through August 11, 2010 due to his work injury.

The claimant was employed by the _____ as a _____. On May 30, 2008 he filed an occupational injury claim for date of injury of _____.

His claim was initially denied on July 24, 2008.

By reconsideration decision dated September 10, 2009, the claim was accepted for lumbar sprain, lumbar sacral spondylosis and herniated lumbar disc at the L4-L5.

A review of the computer record shows that the claimant filed another claim for date of injury January 30, 2008. The case was created under case number _____. The case was accepted on June 2, 2008 for thoracic strain. The claimant received COP after the injury. The claimant filed for compensation under that claim and was paid for intermittent wage loss from March 19, 2008 through April 30, 2008 for 56 hours. According to the CA-7 form, the claimant returned to modified duty on March 22, 2008. However, no job offer was found within the record. Also, on the CA-7a for wage loss beginning on April 7, 2008, the employer indicated the claimant was not able to comply with full duty and was sent home from work.

In the instant case, a CA-7 form dated August 13, 2010 was received from the claimant for intermittent compensation beginning on January 6, 2007.

In a letter dated August 13, 2010, which accompanied the CA-7 form, the employer noted that the claimant was last in a pay status on May 28, 2008 and was separated from employment on March 1, 2009. The employer noted that the claimant filed for compensation for intermittent lost time from work from January 6, 2007 to April 19, 2008 for doctor's appointments and therapy. The employer pointed out that the claimant worked night shift, which began at 2200, and since the appointments were during the day, the claimant was not entitled to compensation. They also noted that there was no medical documentation to substantiate the absences from work.

The Office determined there was insufficient medical evidence to support payment of compensation. Therefore, by development letter dated August 20, 2010 the claimant was advised

of the evidence that was needed to support payment of compensation for the period claimed. The Office provided the claimant 30 days to submit the evidence.

The Office, by decision dated October 18, 2010, denied compensation because the evidence of record did not support that the claimant was disabled from working for the period claimed. Also, in the decision the Office advised the claimant that any lost time from work after January 30, 2008 should be filed under case number

The claimant disagreed with the decision and requested, through his attorney, a hearing before an OWCP representative.

A hearing was held on February 14, 2011 at which the claimant was represented by attorney Paul Felser. At the hearing Mr. Felser requested and was granted additional time to provide evidence to support the claim.

Mr. Felser argued, since no work injuries had yet been accepted, the employing agency did not consistently accommodate the claimant with light duty work. He also stated that when light duty was provided the employer did not consistently provide work within the claimant's restriction, which contributed to the claimant's absences from work.

A copy of the hearing transcript was sent to the employer for comment. No comments were submitted.

Since the hearing, by letter dated March 31, 2011, the claimant's attorney provided additional arguments to support the claim for payment of compensation. Mr. Felser argued that

sufficient medical evidence was provided to support that the claimant was disabled from working,

the medical evidence supported the claimant had chronic work restrictions due to the accepted conditions,

the employer was not able to accommodate the work-related conditions with suitable employment, and

the Office should, at the very least, refer the matter to a second opinion physician, regarding the nature and extent of the claimant's work-related disability.

An extensive review of case file has been completed.

The medical records show that the claimant was under the care of Dr. _____ beginning in early 2006. The claimant was treated for headaches January 9, 2006, February 8, 2006 and March 1, 2006. On April 25, 2006 the claimant reported that he had right shoulder pain. On June 28, 2006 he complained of lower back pain. On July 7, 2006 the doctor reported that the claimant was improved when he was off work, but the pain in his back started again when he returned to work. On July 10, 2006, the doctor reported that the low back pain was unchanged.

The claimant requested that the doctor complete a work restriction form. The claimant was diagnosed with stable lumbago with pain that would come and go and was exacerbated from standing for a long time and heavy lifting. An employer work-restriction form was completed on July 10, 2006. The claimant's work activities were restricted from July 7, 2006 to August 1, 2006. On the form the doctor indicated the claimant had restrictions from significant low back pain.

On July 10, 2006 and August 6, 2006, the claimant requested a light duty job because of back pain.

On August 1, 2006 the claimant was seen again by Dr. . The claimant reported back pain. The doctor advised him to see an orthopedist for consultation.

The claimant was seen on August 4, 2006 by Dr. . The doctor found marked spasm and tenderness over the lumbar paravertebral musculature with moderate tenderness over the right SI joint and sciatic notch. The straight leg raise test was negative bilaterally and there was full painless range-of-motion of the hips. The doctor diagnosed lumbar and SI strain. The doctor provided work restrictions and indicated the claimant could not lift more than twenty (20) pounds.

Dr. saw the claimant again on August 11, 2006, August 18, 2006, and on September 11, 2006. The doctor continued to restrict the claimant's work duties.

On September 22, 2006, Dr. raised the claimant's lifting restriction to 30 pounds. Then on October 13, 2006, the doctor released the claimant to full-duty work as tolerated.

On November 7, 2006 the claimant advised the employer that he was able to return to full duty.

On November 13, 2006 Dr. saw the claimant for follow-up. The claimant was advised to continue on full-duty.

On November 20, 2006 the claimant returned to Dr. and reported an increase in pain with lifting 20 to 30 pounds. The doctor held the claimant off work and recommended an MRI and steroid injection to help determine if the claimant needed surgery or a pain procedure.

An MRI was performed on November 21, 2006. The claimant was diagnosed with L4-5 mild disc desiccation and small central disc protrusion/herniation.

On December 11, 2006 Dr. released the claimant to light duty with a lifting restriction of less than ten (10) pounds. Also, the claimant was advised to stop any activity that caused him pain. The doctor indicated that he believed the claimant would need to be on restrictions for several months.

The claimant was seen in follow-up with Dr. on January 5, 2007, January 18, 2007, February 16, 2007 and March 16, 2007.

On April 19, 2007 Dr. _____ examined the claimant and determined that the claimant had reached maximum medical improvement (MMI). The doctor determined that the claimant had residual low back impairment for which he needed work restrictions of no lifting, carrying, pulling or pushing more than twenty (20) pounds. The doctor also indicated that he had completed a form in which he noted that the claimant was unable to work from April 7th to the 12th. The doctor indicated that during the period the claimant had increased muscle spasms and back pain. The doctor noted that the claimant's condition had improved with the rest and home exercises. The doctor advised the claimant that he was closing his practice at the location. The doctor provided the claimant with names of other physicians that he could contact and arrange for follow-up.

By letter dated April 19, 2007, the employing agency issued an official letter of warning to the claimant because of unsatisfactory attendance. The employer advised him that since January 13, 2007 he had incurred unscheduled absences from duty as follows: January 31 – February 1, 2007, 16 hours sick leave; March 10 - March 11, 2007, 16 hours of sick leave and from March 30 – April 3, 2007, 24 hours of leave-without pay in lieu of sick leave.

The claimant was then seen by Dr. _____ . On November 8, 2007, Dr. _____ diagnosed the claimant with thoracic sprain and L4-5 disc herniation. The doctor saw the claimant again on December 13, 2007 and January 3, 2008 and continued him on light duty.

By letter dated January 25, 2008, the employer notified the claimant that he was suspended for fourteen (14) calendar days because of unsatisfactory attendance. The dates of non attendance were listed as follows: October 9, 2007- .44 hour late; October 10, 2007-.51 hour late; October 14, 2007- .13 hour late; October 17, 2007-.42 hour late; October 21, 2007 -.29 hour late; October 24, 2007-.17 hour late; October 31, 2007- 28 hour late; November 6, 2007-.19 hour late; November 17, 2007- 19 hour late; November 18, 2007- 44 hour late; November 24, 2007- .67 hour late; November 24 and 25, 2007-12.20 AWOL; November 28, 2007-.09 hour late; December 16, 2007- 62 hour late; December 17, 2007- 8 hours LWOP; December 18, 2007- 36 hour late; December 23, 2007- 1.91 hour late; January 16, 2008- 43 hour late; and, January 19, 2008- 20 hour late.

On January 30, 2008, as noted previously in this decision, the claimant filed a traumatic claim of injury for upper back injury.

On January 31, 2008 Dr. _____ examined the claimant and diagnosed thoracic strain and continued to restrict him to working light duty.

On February 18, 2008 Dr. _____ reported the claimant had complaints of severe pain, stiffness and spasms. The doctor examined the claimant and found palpable spasm. The doctor diagnosed thoracic strain. The doctor held the claimant off work and indicated that he would see him back in four weeks.

Dr. _____ saw the claimant on March 17, 2008 and returned the claimant to light duty. On April 3, 2008 the doctor diagnosed resolving thoracic sprain and returned the claimant to full duty.

On April 16, 2008 the claimant was again seen by Dr. . The claimant reported increased pain after working 6 hours. The doctor diagnosed thoracic sprain, rule out herniated disc. The doctor returned the claimant to working 6 hours full duty and 2 hours sedentary-type duty.

On April 22, 2008 a thoracic MRI was completed, which was reported as essentially unremarkable.

By letter dated April 24, 2008, the employer notified the claimant that he would be removed from the effective at the end of his tour of duty on May 30, 2008. He was again charged with unsatisfactory attendance. The employer listed the dates of unsatisfactory attendance as March 19, 2008, 8 hours AWOL; March 23, 2008 .15 hour LWOP (late and short of an 8 hour work day); March 24 – 26, 2008, 24 hours LWOP; and, April 7 – 9, 2008, 24 hours sick leave.

On May 28, 2008 the claimant returned to Dr for treatment of his lumbar condition. The doctor examined the claimant and diagnosed L4-5 disc herniation. The doctor noted that the finding was consistent with repetitive-type trauma of lifting and carrying. The doctor stated the L4-5 lumbar disc herniation was causally related and secondary to work accident consistent with his activities as a postal clerk. He noted that the claimant was at MMI with permanent restrictions of no lifting more than 15 pounds.

On May 30, 2008, the claimant filed the occupational claim, case number , for his herniated lumbar disc.

On June 2, 2008, the thoracic injury, case number , was accepted.

On July 24, 2008 claim number was denied.

On August 7, 2008 the claimant was again seen by Dr. . The doctor provided a history of the occupational injury of the claimant's lumbar spine and of an injury of January 18, 2008 of the thoracic spine. He examined the claimant and diagnosed him with chronic residual lumbar strain/spondylosis and dorsal strain. The doctor stated that within a reasonable degree of medical certainty, the claimant's low back condition probably was caused by and definitely was aggravated by the essential activities of his occupation as a postal clerk. The doctor continued to restrict the claimant from lifting, carrying, pulling or pushing more than 20 pounds.

On September 10, 2009, as the result of a reconsideration decision, claim number for lumbar injury was accepted.

In a report dated May 18, 2010, Dr. noted that the claimant had an exacerbation of his residual lumbar strain/spondylosis. The doctor restricted the claimant to no lifting, carrying, pulling or pushing more than 10 pounds.

Dr. Germain saw the claimant on June 8, 2010 and continued the restrictions of May 18, 2010.

Dr. _____ on July 6, 2010 determined that the claimant had reach MMI and had permanent work restrictions of not lifting, carrying, pulling or pushing more than 10 pounds. He also advised the claimant that he should not bend, twist, or squat because it would aggravate his condition. The doctor stated,

Although I placed this patient at maximum medical improvement from an orthopedic perspective with residual impairment for his lumbar spine, I still feel that this patient has suffered an exacerbation of his pre-existing condition. The physical therapy modalities and therapeutic exercises, which I ordered, are medically necessary and failure to allow this patient to receive treatment may adversely affect his symptoms and functional mobility.

On August 3, 2010 Dr. _____ examined the claimant and stated, “ I feel that this patient’s exacerbation of his per-existing condition has resolved and he is back to baseline of residual symptoms approximating the symptoms he had when I placed him at maximum medical improvement on June 16, 2006. The doctor indicated that the claimant required permanent restrictions of not lifting, carrying, pulling or pushing more than 10 pounds. He also restricted the claimant from bending, twisting or squatting because it could aggravate his condition

In a report dated January 19, 2011, Dr. _____ stated,

I feel that this patient’s exacerbation of his pre-existing condition has resolved and he is back to his baseline of residual symptoms approximating the symptoms he had when I placed him at maximum medical improvement on June 16, 2006.

He still requires a permanent work restriction of only occasionally lifting, carrying, pulling or pushing up to 10 pounds. He may rarely bend, climb, twist, or squat. He should not kneel or lift from waist overhead. He may stand up to one hour as tolerated, he may sit and walk up to two hours as tolerated. In any event, he should cease any activity, which causes pain.

I filled out a new DWC-25 form today and have placed this patient back at maximum medical improvement as of today, January 19, 2011 with permanent physical impairment for his lumbar spine and for his body as a whole of 5% according to the 1996 Florida Uniform PIR Schedule. I expect he will have residual dysfunction and future medical care is anticipated for exacerbations

Within reasonable medical certainty, his low back condition, which I have been treating him for since 2006, is causally related to the essential activities of his occupation as a _____ and continues to prevent him from returning to and performing his original job description. I recommend retraining for a job compatible with the above permanent restrictions.

The term disability as used in the Federal Employees' Compensation Act¹ means the incapacity because of an employment injury to earn the wages that the employee was receiving at the time of injury.² Whether a particular injury caused an employee disability for employment is a medical issue which must be resolved by competent medical evidence.³ When the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in the employment held when injured, the employee is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity.⁴ The Board will not require the Office to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employee's to self-certify their disability and entitlement to compensation.⁵

After review of the evidence, I find that there is sufficient evidence to support that the claimant was restricted from performing his full regular duties as the result of his work injuries. The medical evidence shows that the claimant was partially disabled and was placed on work restrictions. Therefore, he is entitled to compensation for wage loss for any period that he was either totally disabled or was partially disabled and was not provided a written modified job offer within his work restrictions. Neither case record contains any job offers for either light or limited duty. In addition, on the CA-7a forms, provided for both the work-related injuries, the employer indicates that the claimant was out of work for much of the time listed because he could not perform his full work duties. This indicates that there was no work made available to him within his restrictions. This is further substantiated by the fact that the employer did not include those periods of absences on their disciplinary action notices.

However, before compensation can be paid for some of the period claimed, further information should be obtained from the employer as follows:

The employer should be asked to provide the hours the claimant was required to work from January 6, 2007 through March 30, 2007. On the 7a form it is noted that the claimant missed work for therapy and doctor visits during the period. The claimant's normal work duty hours began at 10:00 p.m. It is unclear if the employer changed the claimant's work hours to accommodate him during this period. The claimant should also be asked as to whether his work hours changed during the period. A copy of the 7a should be sent to him so that he is aware of the dates in question.

From March 31, 2007 through January 29, 2008 (the date before the traumatic work injury occurred), the employer indicated on the CA-7a form that the claimant was off work, for the most part, because he could not perform his full duties. There is no evidence in the record that the employer offered the claimant a written job offer within his restrictions during the period he claimed wage loss. If no suitable work was offered, then the claimant is entitled to compensation for wage loss for the period. Also, it is unclear whether the work duty hours were changed during this period. On the 7a form the

¹ 5 U.S.C. §§ 8101-8193; 20 C.F.R. § 10.5(f)

² *Paul E. Thams*, 56 ECAB 503 (2005).

³ *id.*

⁴ *id.*

⁵ *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

employer indicated, for some of the period, that the claimant lost time from work for doctor visits. Therefore, it appears his work hours may have been changed. In addition, there is no indication on the form that the claimant worked during any of the periods claimed. Therefore, the employer should be asked to provide a day-to-day breakdown on a 7a form with full information with the dates and number of hours the claimant worked and or took some type of leave for the day. The information is needed to properly determine the exact amount of wage loss for all the periods claimed.

Since the claimant was previously paid compensation for 56 hours of wage loss in case _____, the Office should carefully review both injury cases before paying any additional compensation from January 30, 2008 to the date the claimant was terminated in May 30, 2008 to ensure that an overpayment does not occur. Also, it appears the claimant is entitled to additional wage loss in claim number _____, if the employer did not accommodate the claimant's restrictions. Further, investigation should be undertaken on this issue. As stated previously, there is no offer of limited duty work or light duty work in either case file record. Also, the employer indicated on the 7a that for much of the period the claimant had wage loss because he could not perform his regular duty. Therefore, it appears there was no offer of suitable work.

In similar cases where employment has been terminated for misconduct and disability is subsequently claimed, the Board has noted that the term "disability" means the "incapacity because of injury to earn the wage which the employee was receiving at the time of such injury."⁶ Disability benefits are payable regardless of whether the termination of employment was for cause if the medical evidence establishes that the claimant was unable to perform his assigned duties due to his injury-related condition.⁷

For the wage loss before or after the claimant was terminated, it is unclear as to whether the claimant was provided a modified duty job offer within Dr. _____ or Dr. _____ restrictions. The employer's letter of termination clearly indicates dates in which Dr. _____ and Dr. _____ had restricted the claimant from working full duty. Also, there is no evidence to support that the claimant was ever returned to a job within the work restrictions of his doctors. If the employer did not provide work within his restrictions, then the claimant would be entitled to compensation due to wage loss for those dates and after termination. No recurrence of total disability would need to be established because he did not have the ability to continue regular duty, which appears to have been all that was made available to him.

On remand case number _____ and the instant case should be combined. The Office should contact the employer and obtain addition information from the employer as outlined above. Once all appropriate development is completed, a new decision should be issued regarding the claimant's entitlement to lost wages from January 6, 2007 and continuing.

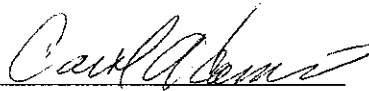
⁶ *John W Normand*, 39 ECAB 1378 (1988).

⁷ *Regina C. Burke*, 43 ECAB 399 (1992) (the Board noted that the Office had erroneously relied upon the case of *Clentino Laspina*, 13 ECAB 201 (1961) as support for the proposition of law that an employee dismissed for misconduct is no longer entitled to monetary compensation regardless of whether accepted employment-related conditions continue to cause a loss of wage-earning capacity).

In accordance with the above findings, the decision of the Office dated October 18, 2010, is set aside and the case **remanded for further development.**

MAY 10

Date:
Washington, D.C.



Carol Adams
Hearing Representative
for
Director, Office of Workers'
Compensation Programs