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

RECEIVED MAY 17 2010

MAY 12 2010

Date of Injury:
Employee:

Dear Mr. :

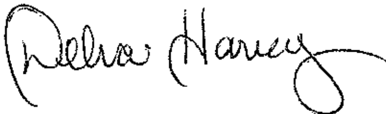
This is in reference to your workers' compensation claim. Pursuant to your request for a hearing, the case file was transferred to the Branch of Hearings and Review

A hearing was held on 02/22/2010. 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

PAUL FELSER
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 , Jacksonville, Florida. Case No.: . Oral hearing was held on February 22, 2010, in Jacksonville, Florida.

The issue is whether the evidence of record establishes disability for work for the period claimed, March 7, 2005, through November 15, 2007, and ongoing.

The claimant, date of birth, , , was employed by the in Jacksonville, Florida, as a Mail Handler. He was injured on , in the performance of duty. His claim was initially accepted for a lumbar strain and bilateral knee ACL tears. He has undergone multiple knee surgeries. He returned to work in 1996 as a Modified General Clerk. The Office issued a formal decision on January 30, 1997, reducing his benefits to zero, as the Office determined the Modified General Clerk position fairly and reasonably represented his wage earning capacity.

The claim has since been expanded to accept the conditions of left knee chondromalacia, patella; internal derangement of the left knee, MRSA (methacillin-resistant staphylococcus aureus), and pyogenic arthritis of the lower leg.

The claimant lost time intermittently from March 7, 2005, through November 15, 2007, when he stopped working. He filed the Form CA-7, Claim for Compensation, for wage loss for intermittent hours from March 7, 2005, through October 15, 2007, and for wage loss beginning November 15, 2007, through the present. The Office requested additional evidence to support disability.

A June 1, 2005, work/school release from Dr. , specialist in physical medicine and rehabilitation, stated the claimant was unable to work indefinitely "since his hospitalization on March 08, 2005." The hospital reports were not received. It is unknown for what condition the claimant was hospitalized or why he was held off work. On August 26, 2005, Dr. continued to hold the claimant off work stating his current physical health "does not support the ability for him to perform any activities that would support gainful work." The physician continued that it was "unusual for me to keep individuals 'off of work,' however, given his condition he is incapable of any gainful employment @ this time." On March 7, 2006, Dr. stated he could return to work with restrictions.

Dr. diagnosed chondromalacia, and post infection arthritis and stated the claimant had been disabled since September 18, 2003. Dr. , dermatologist, stated the claimant could not work from February 15 to March 10, 2008. He did not

provide the condition for which the claimant was being treated nor did he provide any reasoning for holding the claimant off work.

In a report of April 9, 2008, Dr. diagnosed chondromalacia of the left knee, chronic skin dermatitis, and chronic MRSA. He stated the claimant had "chronic cutaneous disease due to allergy to paper in work environment. Chronic cutaneous disease [secondary to] MRSA. Chronic arthritis." He stated the claimant was unable to work from September 18, 2003, to the present. On May 1, 2008, Dr. stated the claimant was infectious and will never be able to return to work.

The Office referred the file to its District Medical Advisor (DMA) on May 29, 2008, who stated the MRSA was consequential to the performed knee surgery. However, he stated there was not sufficient evidence to establish that the chronic MRSA prevented the claimant from returning to work and there was no disability from the MRSA.

A report from Dr. was received. This report was dated October 29, 2008. Dr. noted history of the knee injury and the surgery. He stated the claimant developed MRSA postoperatively at the PICC (iv) site "which subsequently spread through the blood stream to the left knee. After he developed this septic joint he required long courses of intravenous and oral antibiotics."

He continued:

> "He developed dermatitis at the PICC line site due to the MRSA infection which has never resolved and has spread to involve his hands, arms and portions of his trunk. This dermatitis has become very severe resulting in scarring, open sores, as well as, intractable pain and itching."

He stated the claimant worked until November 15, 2007, "when he had to stop because of his chronic MRSA infection causing recurrent boils and draining sores on his body and the progressive deterioration of his left knee. He has to wear a knee brace at all times to prevent falling due to the damage caused by his septic arthritis. He has severe pain in his left knee caused by his septic arthritis and the knee is swollen and unstable on exam." He stated the claimant also suffers from "a complex skin disorder brought on by occupational exposure and chronic MRSA. In my opinion his dermatitis is an autoeczematisation (id) reaction to occupational exposures ("persistent occupational contact dermatitis") and to his MRSA infection which has never been cleared from his system. This is complicated by recurrent secondary infection with MRSA." He stated he believed the claimant was totally disabled and could never return to work.

The Office prepared a Statement of Accepted Facts (SOAF) and referred the claimant to Dr. specialist in infectious diseases, on April 28, 2009, for a second opinion examination. The claimant had well healed scars on both knees from previous surgery. He had no significant effusion of either knee joint with no significant warmth or tenderness of the knees. He stated the claimant had "significant erythema and edema involving the right forearm extending to the elbow and, to a lesser extent, the right upper

arm. He has a few abrasions/scabs on the left forearm. The patient has dry scaly skin involving both ears and behind the ears extending to the neck very highly suggestive of chronic dermatitis."

He stated the claimant had no evidence of active septic joint disease. He noted evidence of moderate cellulitis at the time of the exam involving the right forearm. He also stated the claimant had chronic edema and severe chronic dermatitis on both upper extremities, but he did not opine as to whether these conditions were related to the MRSA. He stated the claimant "is likely colonized with MRSA on a chronic basis." He stated, "I do feel that MRSA is transmitted from person to person or via object. The patient has no draining lesion at the present time, but he seems to be a chronic carrier where transmission is by direct contact is possible but he does not present a public health risk for the healthy population." He stated the claimant was able to perform a sitting job "unless he has an acute episode of cellulitis, which he has right now. In between his episodes of skin issues, I do not find any direct medical reason not to permit him to do such a sitting job." He stated the claimant was capable of performing a "low pressure job where he does not have much contact with health compromised people around him. His risk of transmission is by direct contact where it can be prevented with precautions and education to him and his coworkers or to give him a separate room of office to work from."

The physician ordered laboratory testing and on July 28, 2009, stated the CBC was within normal limits; sedimentation rate was 6 and his CRP was less than 0:5. "All were within normal limits, indicating that there is no acute infection now."

The Office referred the file back to the DMA who agreed the MRSA should not preclude the claimant from working. The claims were denied on September 11, 2009, finding no medical evidence had been received that supported the hours lost were causally related to the employment injury of July 26, 1995, or a consequential condition. The Office also found the claimant should be able to work. The claimant disagreed with this decision and through his Attorney, Paul Felser, requested an oral hearing before an OWCP Hearing Representative.

The hearing was held on February 22, 2010, in Jacksonville, Florida. The claimant did not appear at the hearing but was represented by Mr. Felser. Mr. Felser provided arguments in disagreement with the opinion of Dr. , the second opinion examiner. He noted that while Dr opined the claimant was not a hazard to the public, he stated the claimant required special circumstances, including segregation, to assume employment. He stated the claimant's situation constituted a risk to the public. He stated the claimant has attempted to return to work but the totality of all his medical conditions is precarious. Mr. Felser noted the claimant had returned to work shortly before the hearing date.

Mr. Felser was advised that the medical evidence for 2005 and 2006 was sketchy and did not establish disability. It was noted the medical evidence stated the claimant was hospitalized in March 2005 but no records from that hospitalization had been received. He was also advised that no medical evidence existed to establish the claimant's dermatitis and/or skin sores were causally related to his MRSA.

A copy of the hearing transcript was sent to the Employing Agency for review and comment on March 10, 2010. There was no response.

Mr. Felser submitted a post-hearing brief restating his arguments. He stated Dr. report, at least, constituted a conflict in the medical evidence. Additional medical reports were received, most of which have been previously received and considered.

I have carefully considered all the evidence of record in this case and find the Office's decision of September 21, 2009, must be SET ASIDE. In this case, the Office issued a formal loss of wage earning capacity decision on January 30, 1997, finding the Modified General Clerk position fairly and reasonably represented the claimant's wage earning capacity. There is no evidence this decision has ever been vacated and the claimant was working in this position on the date disability began in March 2005.

Once a loss of wage-earning capacity is determined, a modification of such a determination is not warranted unless there is a showing of either a material change in the nature and extent of the injury-related condition, or that the employee has been retrained or otherwise vocationally rehabilitated or that the original determination was in fact erroneous. The burden of proof is on the party attempting to show that the award should be modified.[1] As the formal LWEC decision was in place, the proper standard of review was whether the Office should modify this decision using one of the three criteria listed above. In this case, a material change in the nature and extent of the injury related condition would be the proper criterion for review. The Office's decision is SET ASIDE since the proper decision was not issued.

However, additional development is needed before the Office can issue a new decision. The Office failed to weigh the medical reports of Drs. , the Attending Physician, and , the second opinion specialist. The Office disregarded Dr. report stating that his opinion was submitted "after the fact and there is no test or objective evidence to support that your MRSA infection was active." However, Dr. opinion was rendered after the fact with the Office giving that report probative value. Dr. did provide test results in July that showed there was no active MRSA infection at that time but on the date of his examination in April 2009, he stated the claimant had chronic edema and dermatitis on both of his upper extremities. Dr. has stated these conditions are resultant from the MRSA developing

[1] *Raymond A Nester*, 50 ECAB ___ (Docket No. 96-1384, issued December 2, 1998).

around the PICC line and that they spread over his body. This would establish a *prima facie* claim on the dermatitis being consequential to the employment injury. Dr. did not comment on the causal relationship of the dermatitis and/or edema conditions. He states that the claimant should be able to work but in a controlled environment and away from other employees and should not work when he has an active infection. Dr. , however, states that the claimant is totally disabled from the MRSA and the dermatitis.

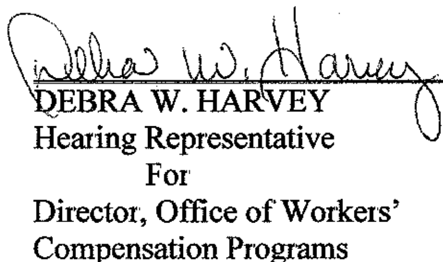
I find that the Office should update the SOAF as necessary and refer the claimant to a Board-certified dermatologist for a second opinion examination to determine if the dermatitis and/or edema is related to the MRSA. The Office should question the specialist as to whether this condition disabled the claimant from working during any or all or the periods claimed.

In addition, after the second opinion report has been received, the Office should refer the claimant for a referee evaluation to determine if he was disabled for any or all of the periods claimed due to the MRSA. Section 8123(a) provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Office shall appoint a third physician who shall make an examination.[2] The Office should also determine the specific dates the claimant has been working since Mr. Felser stated he returned to work just prior to the date of the hearing. This may constitute a closed period of disability.

Once the medical reports have been received, *de novo* decisions should be issued.

DATED: **MAY 12 2010**

WASHINGTON, D.C.



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

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[2] *Richard L. Rhodes*, 50 ECAB ___ (Docket No. 98-2346, issued February 23, 1999).