

File Number:  
HR12-D-H

U.S. DEPARTMENT OF LABOR

**RECEIVED** APR 20 2012

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

APR 12 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 12/30/2012. Based upon that hearing, it has been determined that the decision of the District Office should be **reversed** as outlined in the attached decision. The case is also **remanded** for additional development on other issues that were found when the case was reviewed.

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 FELSER  
FELSER LAW FIRM  
7 E CONGRESS ST  
SUITE 400  
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 ; Case number  
A hearing was held on December 30, 2011.

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The issue for determination is whether the Office has met its burden to reduce compensation.

The claimant was employed as a with the  
in . He filed a traumatic claim of injury for date or  
injury of . The claimant injured his right knee while helping to breakup a  
fight between two inmates. During the incident he fell to the ground while holding onto  
one of the inmates. His claim was accepted for aggravation of osteoarthritis of the right  
knee and later right medial meniscus tear was added to the accepted conditions.

In a report dated November 20, 2009, Dr. reported that the claimant  
was not having any episodes of locking, popping or giving way of the right knee.  
The doctor also noted that the claimant had right total knee replacement on April 3,  
2008, right medial collateral ligament repair on August 26, 2008, irrigation and  
debridement (I & D) for septic right knee on October 17, 2008, right knee revision on  
February 5, 2009, I & D for septic right knee on March 20, 2009 and March 24, 2009  
and I & D for right septic knee with tibial polyethylene exchange on March 27, 2009. The  
doctor examined the knee and found no tenderness in the calf or thigh, a healed  
anterior incision without evidence of drainage or infection, mild swelling, range of motion  
of full extension and flexion to 115°, good collateral ligament balance, and intact motor,  
sensory and circulation function. The doctor diagnosed prosthetic joint implant failure,  
bacterial arthritis and flat foot. The doctor indicated the claimant was released to light  
duty lifting no more than 25 pounds and restriction of standing no more than one hour  
continuously. The doctor noted that the claimant should not have any direct contact with  
inmates. The doctor determined the claimant had reached maximum medical  
improvement (MMI) and determined the claimant had 15% whole body permanent  
impairment, based on the current AMA Guides.

On December 6, 2009 Dr. also provided permanent work restrictions on an  
Office work restriction form. The doctor noted that the claimant could not return to his  
former employment because he could not have direct contact with inmates because of  
safety precautions "to avoid re-injury to his surgical knee." The doctor restricted the  
claimant from walking or standing more than 3 to 4 hours. He also restricted pushing,  
pulling and lifting to 25 pounds and totally restricted the claimant from squatting and  
kneeling but allowed occasional climbing.

The Office determined that the work restrictions from Dr. \_\_\_\_\_ were the best representation of the claimant's work abilities.

On December 21, 2009 the Office referred the claimant for vocational rehabilitation services.

A rehabilitation counselor (RC), assigned to the case, determined that \_\_\_\_\_ and \_\_\_\_\_ were within the claimant's work restrictions and were reasonably available within the claimant's commuting area.

The claimant completed a short term training program to update his computer skills. Afterwards, the claimant was provided 90 days of job placement assistance to help him find employment. However, the claimant was unable to secure employment.

The Office determined that the claimant was capable of working as a \_\_\_\_\_ making \$400.00 a week.

In a closure report dated March 11, 2011, the RC indicated a labor market survey was completed on December 20, 2010 showing the Cashier and Security Officer positions were in sufficient numbers within a reasonable commuting area. The RC indicated that the information was confirmed through local employer contacts and a \_\_\_\_\_ survey that supported the positions were reasonably available in the claimant's commuting area. Also, the RC noted on the report that the Security Officer and Cashier positions were classified from sedentary to light for activity level per the DOT.

In a medical report dated May 24, 2011, Dr. \_\_\_\_\_ diagnosed the claimant with patella subluxation/instability and cavus foot bilaterally. The doctor also indicated he was referring the claimant to another physician for evaluation of the right patella replacement. The doctor noted the claimant remained in light duty status. The doctor indicated that the claimant's restrictions were no climbing, squatting or prolonged standing. The doctor provided the following examination findings:

**INSPECTION/PALPATION:** Tenderness is not noted in the calf or thigh. Anterior incision healed without evidence of drainage or infection. There is palpable subluxation of the patella laterally with flexion associated with mild crepitation. Swelling is mild. **RANGE OF MOTION:** Full extension with flexion of 130°. **STABILITY:** no significant collateral ligament laxity. **MUSCLE STRENGTH AND TONE:** Motor and sensory function intact distally. Circulation intact.

**Right Foot:**

**INSPECTION/PALPATION:** Mild tenderness over midfoot dorsally, forefoot non-tender, hindfoot non-tender, cavus deformity present. **RANGE OF MOTION:** normal mobility to first and lesser MTP joints, moderate decrease inversion/eversion. **STABILITY:** no instability. **MUSCLE STRENGTH AND TONE:** pain inhibition of motor strength, sensory intact.

Left Foot:

INSPECTION/PALPATION: Mild tenderness over midfoot dorsally, forefoot non-tender, hindfoot non-tender, cavus deformity present. RANGE OF MOTION: normal mobility to first and lesser MTP joints, moderate decrease inversion/eversion. STABILITY: no instability. MUSCLE STRENGTH AND TONE: pain inhibition of motor strength, sensory intact.

By proposed notice of reduction of compensation dated May 26, 2011, the claimant was advised of Office's intention to reduce compensation based on his ability to earn wages as a Security Officer. The claimant was afforded 30 days to submit evidence or argument if he disagreed with the proposal.

The Office received additional evidence, as well as, a letter dated June 27, 2011 from the claimant's attorney. The attorney argued that the Office had not properly followed procedures, the law and Board decisions to determine that the Security Officer position was within the claimant's job capabilities at the time of the proposed reduction.

In a detailed letter dated June 16, 2011 to Paul Felser, a private vocational rehabilitation counselor, provided a rehabilitation evaluation and found that the claimant did not have transferable skills for a Cashier position. She indicated that the claimant did have transferable skills for a Security Officer position but the Security Officer position in the DOT was classified as light work. Ms. stated that the Office's rehabilitation counselor based the transferable skills analysis on the category of light work without taking into account the additional restrictions imposed by the physician of not being able to stand and walk for the length of time light duty required. She noted that light duty work requires standing and walking greater than 1/3 of a work day.

In a June 22, 2011 report, Dr. stated the claimant continued to experience occasional unpredictable instability due to the patella tracking and subluxation. The doctor noted that the claimant was looking at job opportunities that were suitable. The doctor stated, "It is evident that he will fall into a sedentary classification as he is unable to stand or walk for any significant length of time." The doctor indicated he would be meeting with a rehabilitation counselor to discuss the claimant's work status and answer questions regarding the claimant's work status. The doctor examined the claimant and noted palpable subluxation of the right patella, laterally, with flexion associated with mild crepitation. The doctor also found some mild swelling of the right knee. The doctor indicated that the claimant should continue on sedentary work status with limited standing and walking. The doctor stated that the claimant would benefit from realignment versus patellectomy.

In a letter by Ms. dated June 22, 2011, to Dr. , she requested additional restriction information from the doctor. The doctor was asked to indicate the type of work the claimant could perform. The doctor checked the block that indicated the claimant could seldom stand less than 1/3 (2.6) hours in an eight hour work day. In

regards to walking the doctor checked the block that indicated the claimant could seldom walk less than 1/3 (2.6) hours in an eight hour day. The doctor signed the form.

In a letter addressed to Paul Felser dated June 22, 2011, Ms. [redacted] indicated that she believed that the claimant's work restriction were less than light duty. She stated that she met with Dr. [redacted] to obtain specific clarification of the claimant's work restrictions and to discuss his recommendations for additional surgery. The counselor indicated that Dr. [redacted] had restricted the claimant to sedentary work, based on the claimant's walking and standing restrictions – less than 1/3 of an 8 hour day. The counselor noted that Dr. [redacted] found that the claimant suffered from subluxation of the right patella, which was causing instability of the right knee when walking. The counselor's opinion was that the Security Officer position was identified as light category of work as identified by the DOT and, therefore, was an inappropriate job goal for the claimant. Ms. [redacted] also noted that she conducted research regarding Cashier I and Security Officer positions (using the [redacted], Skill Tran, and Career Infonet databases in the [redacted] Area) and found that entry level Cashier job openings, for which the claimant might qualify, were in the retail and service industry. She noted that the jobs required prolonged standing and possible extended walking and other duties that were outside the claimant's work duties. Ms. [redacted] also found that the job openings required work experience in the use of computers and programs. Ms. [redacted] stated she found 100 openings with various employers but none of the openings appeared to be appropriate based on the physical demands and experience skills required. In regards to the Security Officer positions, Ms. [redacted] found there were no job openings within the claimant's work restrictions. She stated that the Cashier I and Security Officer positions were not appropriate occupational goals for the claimant in that the jobs did not exist within the claimant's capabilities. She indicated she based her opinion mainly on the number job openings within the area within the claimant's work restrictions and vocational abilities.

On July 12, 2011 the claimant was examined by Dr. [redacted] for the subluxation of the right patella. The doctor found that the alignment of the right patella height was normal. The doctor did find tenderness of the medial wall trochlear groove, the medial patellar facet and the inferior pole patella. The doctor noted that the patellar tracking was normal. X-ray of the right knee was also completed. The doctor reviewed the x-ray report and noted it showed no fracture, no dislocation, preserved joint spaces and normal alignment. The doctor diagnosed osteoarthritis and prescribed topical gel and home exercise.

The Office determined the information was insufficient to change the recommendation to reduce compensation. Therefore, on July 21, 2011 the Office made the proposed action final and reduced the claimant's compensation based on his ability to earn wages as a Security Officer.

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

In a letter dated June 8, 2011, (received in the case record on August 5, 2011) Dr. \_\_\_\_\_ stated he was treating the claimant for a major depressive disorder – recurrent and in partial remission. The doctor stated he was having difficulty getting the claimant's symptoms under control and it had required fairly aggressive treatment. The doctor stated, "In my opinion, this recurrent depression is directly related and a consequence of the stress associated with his work related injury and the resulting inability to work. His depressive symptoms have responded to some degree but he continues to have residual problems of motivation, energy, attention and focus. These residual symptoms of depression would clearly impact his ability to maintain gainful employment."

In a letter to the claimant dated June 15, 2011, (received in the case record on August 5, 2011) Dr. \_\_\_\_\_ wrote "I assume you are not comfortable working as a security guard because the right knee occasionally gives out. The patella is popping out as we have documented. Additional reconstructive surgery would be required to correct the problem with the patella. I would agree working as a security guard would be unsafe for you. Do not hesitate to contact me if you have any further questions."

In a letter dated December 8, 2011, Dr. \_\_\_\_\_ stated that the claimant was at MMI and had permanent restrictions of sedentary work with limited standing and walking. The doctor indicated the claimant had continued problems with his right knee with increased pain and swelling and had right knee aspiration in October. Dr. \_\_\_\_\_ noted that the claimant was referred to a doctor at \_\_\_\_\_ for possible surgery for patella realignment arthroplasty vs patellectomy; however, the doctor did not recommend surgery due to the possibility of recurrent infection. Dr. \_\_\_\_\_ stated that there was a palpable subluxation of the patella, laterally, with flexion associated with mild crepitation. The doctor stated that the claimant's condition was directly related to his work injury of May 17, 2007.

A hearing was held on December 30, 2011 at which the claimant was represented by Paul Felser, attorney.

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

Section 8115(a) provides that, if actual earnings of the employee do not fairly and reasonably represent his or her wage-earning capacity or if the employee has no actual earnings, the wage-earning capacity as appears reasonable under the circumstances is determined with due regard to: (1) the nature of the injury; (2) the degree of physical impairment; (3) his or her usual employment; (4) age; (5) his or her qualifications for other employment; (6) the availability of suitable employment; and (7) other factors or circumstances which may affect wage-earning capacity in his or her disabled condition.<sup>1</sup>

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<sup>1</sup> Loni J. Cleveland, 52 ECAB 171 (2000)

Where vocational rehabilitation is unsuccessful, the RC will prepare a final report, which lists two or three jobs which are medically and vocationally suitable for the employee and proceed with information from a labor market survey to determine the availability and wage rate of the position.<sup>2</sup> Office procedures provide that the rehabilitation specialist is an expert in the field of vocational rehabilitation and that the Office claims examiner may rely on his or her opinion as to whether a job is reasonably available and vocationally suitable.<sup>3</sup>

The fact that a claimant is not able to secure a job does not establish that the work is not available or suitable. If the evidence establishes that jobs, in the selected position are reasonably available, the selection of such a position is proper even though the employee has been unsuccessful in obtaining work or has submitted documents from individual employers who indicated they did not have an available position.<sup>4</sup>

After reviewing the evidence, I find the Office has not met its burden to reduce compensation. The decision of the Office is reversed.

On the CA-66 form of August 2, 2010, the RC circled that the jobs required strength levels of lifting up to 20 pounds, occasionally, for light duty level work. The market survey information provided on the CA-66 indicated that there were 1,275 jobs within the commuting area and that the annual growth rate was expected to be 1.9%.

In the final closure report dated March 11, 2011, the RC provided information that the jobs of Cashier and Security Officer were light/sedentary jobs. A CA-66 form dated December 20, 2010 accompanied the closure report in which the RC noted that the survey was made up of jobs of employers from security guard companies to retail department stores as well as medical centers. On the CA-66 the DOT description of the Security Officer position was provided as follows:

Plans and establishes security procedures for company engaged in manufacturing products or processing data or material for federal government: Studies federal security regulations and restrictions relative to company operations. Directs activities of personnel in developing company security measures which comply with federal regulations. Consults with local, district, or other federal representatives for interpretation or application of particular regulations applying to company operations. Prepares security manual outlining and establishing measures and procedures for handling, storing, safekeeping, and destroying classified records and documents, and for granting company personnel or visitors access to classified material or entry into restricted areas. Directs and coordinates activities of personnel in revising or updating security

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<sup>2</sup> *Dorothy Jett*, 52 ECAB 246 (2001).

<sup>3</sup> *id*

<sup>4</sup> *Karen L. Lonon-Jones*, 50 ECAB 293 (1999)

measures due to new or revised regulations. May request deviations from restrictive regulations that interfere with normal operations. May interview and hire applicants to fill security guard vacancies.

Also, on the CA-66 form of December 20, 2010, the RC did not clearly differentiate how many sedentary Security Officer jobs, as described by the DOT, were reasonably available. It was not clear whether the jobs researched to provide the market survey information were sedentary Security Officer type positions similar to the job description found in the DOT or whether the survey was based on any security job to include ones that were in the light strength level and thus would not qualify as sedentary jobs per DOT criteria. In the final decision the Office contended that the RC provided a market survey, which contained only information for sedentary Security Officer positions. However, I find the market surveys do not contain sufficient information to make it clear that the survey information consisted exclusively of information obtained about sedentary jobs.

The RC is required to identify at least two jobs from the DOT within the claimant's restrictions and vocational abilities and also provide market surveys that the jobs chosen are reasonably available in the claimant's commuting area. I find that there is insufficient market survey information to verify that the jobs were available in the commuting area within the claimant's sedentary work restrictions. Therefore, the Office has not met its burden to reduce compensation.

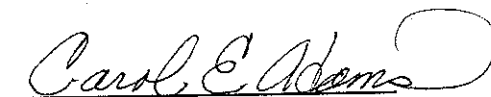
During the review of the case, it was also found that there is sufficient prima facie evidence on record to support the claimant has developed depression due to the work injury. There is also evidence that the claimant has a subluxation of the right patella as the result of his work injuries. Therefore, the Office should develop the case and issue decisions as to whether depression and right patella subluxation should be added to the accepted conditions.

In accordance with the above findings, the decision of the Office dated July 21, 2011 is **reversed**. Compensation should be reinstated to full compensation benefits retroactively to the date of reduction. The case is also **remanded** for additional development as set forth above.

Date:

APR 12 2012

Washington, D.C.



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