

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

RECEIVED JUN 10 2011

JUN 03 2011

Date of Injury:  
Employee:

Dear Mr. \_\_\_\_\_ :

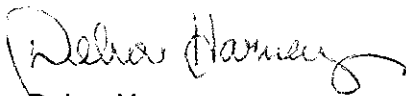
This is in reference to your workers' compensation claim. Pursuant to your request for a hearing, the case file was transferred to the Branch of Hearings and Review.

A hearing was held on 03/07/2011. 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, ATTY  
FELSER LAW FIRM, P.C.  
7 EAST CONGRESS STREET  
SUITE 400  
SAVANNAH, GA 31401

U.S. DEPARTMENT OF LABOR  
Office of Workers' Compensation Programs

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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 No  
Hearing was held on March 7, 2011, in Jacksonville, Florida*

The issue is whether the District Office properly reduced compensation benefits to zero finding the claimant did not provide good cause for cooperating with vocational rehabilitation efforts.

The claimant was employed by the , as a . He was injured on , when he fell off a ladder. The claim was initially accepted for a left calcaneal fracture and strains of the cervical, thoracic, and lumbar spine. The claim has since been expanded to accept lumbar herniated disc at the L3-4 and L4-5 levels as well as chronic pain syndrome. He underwent lumbar laminectomies in 2001. He was placed on the periodic roll and was paid compensation benefits for wage loss. The District Office wrote the claimant on January 15, 2009, for a medical report with an opinion as to whether the claimant was able to work and whether he had work restrictions. There was no response. It is noted that the majority of the treatment notes are signed either by a Physician's Assistant, , or by a Nurse Practitioner, neither which are considered physicians under the FECA. No work restrictions or opinion concerning disability was received by a physician.

The District Office referred the claimant to Dr. , specialist in orthopedic surgery, for a second opinion examination on April 20, 2009. Dr. stated there was no evidence of ankle fracture at the time of the exam, but stated the claimant had disc degeneration and radiculopathy as well as a number of nonemployment related conditions that rendered him partially disabled. However, he stated the claimant could work a sedentary job that provided change of position, limited standing, walking, reaching, bending, stooping and lifting not to exceed 20 pounds. Dr. referred the claimant for a Functional Capacity Evaluation (FCE) that was performed on May 28, 2009. The report of the FCE was dated June 23, 2009, and was signed by ,

Mr. stated the claimant "did fully participate during testing to the best of his abilities. His performance on this date demonstrates **Acceptable** effort, and his impairment likely represents his true status at this time." He continued:

"Based on the subject's efforts as they were demonstrated this date, he is able perform only basic activities at the **Below Sedentary** physical demand level and is unable to safely, consistently, and reliably perform full time work activities. Main limiting factors for return to work success are reports of strong to severe neck, back and lower extremity pain and limited ability to safely, reliably, and consistently perform most functional

activities and tasks. has limited ability to safely reach various body positions and postures, perform various lifts, and ambulate.

Thank you for your referral of for a Functional Capacity Evaluation It was completed on 05/28/2009 It is the conclusion of this Examiner that the subject did fully participate during testing to the best of his abilities. His performance on this date demonstrates **Acceptable** effort, and his impairment likely represents his true status at this time

Based on the subject's efforts as they were demonstrated this date, he is able perform only basic activities at the **Below Sedentary** physical demand level and is unable to safely, consistently and reliably perform full time work activities. Main limiting factors for return to work success are reports of strong to severe neck, back, and lower extremity pain and limited ability to safely, reliably, and consistently perform most functional activities and tasks has limited ability to safely reach various body positions and postures, perform various lifts, and ambulate ”

Dr. submitted an addendum to his second opinion report on June 29, 2009 He stated:

“ has had functional capacity evaluation performed June 23, 2009 by , Pt, CFCE. Mr. demonstrated an ‘acceptable effort and his impairment likely represent his true status at this time.’ Mr concluded that was able to perform only basic activities at the **below sedentary** physical demand level and is unable to safely, consistently, and reliably perform full time work activities

This is an interesting example of will and effort It does not change my opinion of the potential capabilities of this claimant. He has a significant impairment that limits his function to his personal level of tolerance. Statistics would suggest that even at a sedentary capacity he would not be a good employee The office vocational rehabilitation services might be able to locate a position that would satisfy the claimant's needs.”

On June 30, 2009, the Office placed a memo in the file that stated Dr. carried the weight of the medical evidence and the claimant could perform sedentary duty. There is no evidence in this memo, however, that the Office reviewed the FCE. While Dr. addendum had been received in the Office, it has not been scanned into the case file on June 30, 2009

The Employing Agency stated they could not accommodate Dr sedentary work restrictions and the claimant was enrolled in Vocational Rehabilitation Services. A rehabilitation plan was developed, but the claimant failed to sign the plan, stating he had a heart attack on May 1, 2010, and also had problems with diabetes and with his pancreas

By letter of June 4, 2010, the Office advised him there was no medical evidence that rendered him totally disabled. He was asked to provide medical evidence to support total disability within 30 days or to show good cause for not participating with rehabilitation efforts or his benefits would be reduced to zero for failure to cooperate in vocational rehabilitation efforts. Medical

reports were received that established he did have a heart attack in May 2010. However, on November 16, 2010, the Office reduced his benefits to zero, finding he had not provided medical evidence to establish total disability or give cause for not cooperating with rehabilitation efforts. 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 March 7, 2011. The claimant did not appear for the hearing but was represented by Mr. Felser.

Mr. Felser argued that he felt the claim contained factual, procedural, and medical errors and that the claim should be expanded. He stated the claimant responded to the warning letter and provided documentation of a heart attack which he described as a "substantial impediment to him going forward at that particular time." (Hearing transcript, page 8) He stated the District Office should have requested additional medical evidence in follow up. He stated the heart attack is established and the Office should have requested more specifics if it felt additional evidence was needed. He stated the claimant had established disability for work and he should not have to provide additional evidence to establish total disability.

He also questioned the rehabilitation plan and stated it was "nonsensical" for the claimant. He stated the claimant had been suffering from depression since at least 2007 and that has been documented in the case file. He also deals with medication issues. Mr. Felser argued that these conditions are consequential but have not been developed or accepted. He argued that these conditions, in addition to a number of additional conditions, should be taken into consideration as to the claimant's ability to proceed through the vocational rehabilitation process.

He stated Dr. [redacted] was not aware of the claimant's heart condition and did not consider any of the other conditions, especially the depression. He also stated that Dr. [redacted] ordered the FCE, which he may not have done had he been aware of the claimant's heart condition. Mr. Felser noted the FCE stated the claimant was performing at a below sedentary level; the claimant demonstrated acceptable effort; the test was deemed to be valid, and it stated the claimant could not perform full-time work activities. Mr. Felser erroneously stated Dr. [redacted] did not provide an addendum after reviewing the results of the FCE. He noted the claimant was unable to sit, stand, or walk for any length of time; he has difficulty breathing, and has a heart condition.

Mr. Felser also argued that the classroom training that was part of the rehabilitation plan was beyond the restrictions provided in the FCE. He argued that the claimant is unemployable and cannot work.

A copy of the hearing transcript was sent to the Employing Agency for review and comment on March 15, 2011. There was no response.

Additional medical evidence and a post-hearing brief were received after the hearing had concluded.

I have carefully reviewed all the evidence of record and have determined that the decision of the District Office dated November 16, 2010, must be REVERSED and benefits reinstated. I find

that the second opinion report from Dr. \_\_\_\_\_ is deficient and was not sufficient to determine work restrictions. Dr. \_\_\_\_\_ stated on examination that the claimant could work a sedentary job. He ordered an FCE which stated the claimant could work only in a below sedentary level. The claimant was determined to have put forth an acceptable effort and the FCE represented his true capacity at that time. It was determined to be a valid report. When Dr. \_\_\_\_\_ reviewed this report and prepared his addendum, he stated, "This is an interesting example of will and effort. It does not change my opinion of the potential capabilities of this claimant." He did not explain why the FCE did not change his opinion since it was determined to be a valid representation of the claimant's functional capacity.

The record reflects that the claimant's attending physician has not provided any work restrictions. The record also reflects that the claimant has a heart attack, has underlying coronary artery disease and other medical problems, but none of his doctors has provided any medical evidence that the claimant is unable to participate in vocational rehabilitation efforts due to these conditions. However, I find that Dr. \_\_\_\_\_ does not provide any rationale for his opinion the claimant can work sedentary work in light of an FCE that says he cannot work sedentary duty. Thus, his report lacks probative value. I also find the Office failed to consider the FCE report when it determined Dr. \_\_\_\_\_ carried the weight of the medical evidence. In assessing medical opinion evidence, the weight to be accorded such medical evidence is determined by its reliability, its probative value, and its convincing quality. The opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion are factors which enter into this evaluation.<sup>1</sup>

The second opinion performed from Dr. \_\_\_\_\_ was an Office-directed medical examination. While appellant has the burden of proof to establish his claim, the Office has a responsibility in the development of the evidence. Once the Office has begun an investigation of a claim, it must pursue the evidence as far as reasonably possible.<sup>2</sup> In this case, the Office failed to contact Dr. \_\_\_\_\_ for rationale as to why his conclusions on work restrictions differed from that of the FCE that he ordered.

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<sup>1</sup> *Cleopatra McDougal-Saddler*, 47 ECAB \_\_\_\_ (Docket No. 95-2634, issued March 20, 1996)

<sup>2</sup> *Edward Schoening*, 41 ECAB \_\_\_\_ (Docket Nos. 88-1862 and 89-0305 issued November 29, 1989)

Therefore, the decision of the District Office dated November 16, 2010, is hereby REVERSED and the file is returned to the Office for reinstatement of compensation benefits.

The attorney has also asked for expansion of the claim to include depression and effects of prescribed medication. The Office should pursue development as indicated

DATED: JUN 03 2011

WASHINGTON, D C.



DEBRA W. HARVEY  
Hearing Representative  
For

Department of Workers'  
Compensation Programs