

File Number:
HR12-D-H

RECEIVED APR 01 2014

U.S. DEPARTMENT OF LABOR

MAR 27 2014

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

Dear Mr. :

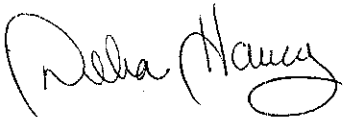
This is in reference to your workers' compensation claim. Pursuant to your request for a hearing, the case file was transferred to the Branch of Hearings and Review.

A hearing was held on 01/09/2014. 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
7 EAST CONGRESS ST
SUITE 400
SAVANNAH, GA 31401

If you have a disability (a substantially limiting physical or mental impairment), please contact our office/claims examiner for information about the kinds of help available, such as communication assistance (alternate formats or sign language interpretation), accommodations and modifications.

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
Employed by the Case
No: *Telephonic hearing was held on January 9, 2014*

The issue is whether the District Office properly terminated entitlement to wage loss and schedule award benefits finding he had not accepted suitable employment under Section 8106 (c)(2), which states that, "a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for him is not entitled to compensation."

The claimant was employed by the _____ as a _____
He injured his low back on _____ after lifting a truck gate. The
claim has been accepted for lumbar sprain, lumbosacral radiculitis, and disorder of the
sacrum. He underwent an anterior lumbar fusion at the L4-5 level on _____
and has been paid compensation benefits for wage loss.

On _____ the Attending Physician, Dr. _____ provided permanent
restrictions that the claimant was able to work eight hours per day with restrictions of no
lifting over ten pounds, alternate sitting and standing every one to two hours with no
repetitive bending. He stated the claimant could drive and could operate a motor
vehicle at work.

On that date, a pain management specialist, Dr. _____ prescribed OxyContin
and Percocet for low back pain.

The RC, _____ stated on _____ that the claimant was
taking Metformin twice a day for diabetes; Glipzide, twice a day for diabetes; Percocet,
50 mg twice a day; Gabapentin, three time per day; OxyContin, 30 mg three times per
day; Lunesta at bedtime; Trazadone for depression; Levocetizine; Exforge HCT once a
day for Hypertension; Bisoprolol for hypertension, and Prevastin for hypertension.

On _____ the Rehabilitation Specialist (RS), _____ stated the
Rehabilitation Counselor (RC) opined that further vocational rehabilitation services were
not expected to enhance the claimant's wage earning capacity. She recommended a
second opinion examination.

The [redacted] offered a modified position based on Dr. [redacted] restrictions on [redacted]. The duties of this job were entering data from reports, reviewing various reports used in the Transportation Unit, clerical work, and delivering small bundles of mail weighing less than ten pounds. The physical requirements were alternate sitting and standing as needed; not lifting over 10 pounds; no repetitive bending, and driving company vehicle as needed. The physical requirements were alternate sitting and standing as needed; no lifting over ten pounds; no repetitive bending, and driving company vehicle as needed, 2-8 hours per day. The claimant did not accept the job offer.

The Rehabilitation Specialist, Ms. [redacted] stated this job "appears to be consistent with the work restrictions as outlined by Dr. [redacted] treating physician. As such, RC [redacted] has been requested to assist in facilitating Mr. [redacted] return to gainful work activity."

The Rehabilitation Counselor stated that Dr. [redacted] had faxed a copy of the job offer "with note stating "Above job description approve 2/26/13. It is signed but there is not reference to my letter and the effect of his high levels of OxyContin and the physical requirement of driving company vehicle as needed."

On [redacted] the Office determined the position was suitable and advised the claimant that he had 30 days to either accept the job offer or provide good cause for not doing so under Section 8106 (c)(2). The claimant stated he could not accept the offered job.

On [redacted] the Office advised him that he had not provided a valid reason for refusing to accept the offered position and had 15 additional days to accept the position or his benefits would be terminated. He still did not accept the position and on [redacted] the benefits were terminated under Section 8106. The claimant disagreed with this decision and requested a hearing before an OWCP Hearing Representative.

Ms. [redacted] wrote on April 26, 2013, that Dr. [redacted] had responded in that the claimant could perform the job duties. She stated, "Claimant was encouraged to communicate and report via the multiple calls and correspondence [redacted] and [redacted]. He stated he didn't believe he could perform duties encouraged to request doctor appointment and communicate with [redacted] and [redacted]. He declined and stated he would get attorney."

A [redacted] statement from Dr. [redacted] stated the claimant could continue light duty.

A [redacted] report from Dr. [redacted] Ph.D, stated the claimant had been diagnosed with major depressive disorder related "to his inability to cope with the pain and physical limitations resulting from his injuries from an OTJ injury. She stated he was unable to work, even in a limited duty capacity due to his depression. She stated he was unable to return to work at his date of injury job because he cannot stand or sit

for a prolonged time without medications which render him unable to do any job." He is also unable to concentrate, focus, or take supervision due to his depression and "rumination."

The telephonic hearing was held on January 9, 2014. The claimant was not present at the hearing but was represented by Attorney Paul Felser.

Mr. Felser noted that he had not been provided with a copy of the decision when it was initially issued but it was reissued. However, he noted that he had not been provided with a copy of the 30-day letter nor was he provided with a copy of the 15-day letter of . He stated that since he had not been provided with a copy of these notices, "you're putting the burden for this omission on an individual who has mental and emotional difficulties, and these difficulties include the inability to concentrate, to focus, to be able to be responsive and to understand what's being asked of him and how to present it." He asked for reversal of the Office's decision since the claimant was not afforded his proper right for counsel.¹

He also argued that the claimant is still suffering from "significant post-injury residuals." He stated that vocational rehabilitation had been reopened in this case just prior to the job offer being issued. He stated the VR memos recommending a second opinion examination were ignored. He stated that the Rehabilitation Specialist noted on January 10, 2013, that "further VR services are not expected to enhance Mr. wage-earning capacity. Accordingly, the RS recommends the case be considered for a second opinion. The VR case is being placed in an interrupt status pending further development by the CE."

He argued that the claimant's work restrictions placed him in a "sub-sedentary" status and the job offered was not sub-sedentary. He stated that a note from the VR supplier stated the claimant could not work and the Office's RS concurred. He argued, however, that the Office went ahead with job search and the 30-day suitability day certification

He stated the claimant had concurrent non-accepted medical conditions of depression, diabetes mellitus, hypertension, radiculopathy, instability, and sacroiliac. He takes Pravastatin, Metformin, Glipizidine, Mobic, Lunesta, Neurontin, Zanaflex, Lunesta, Cymbalta, OxyContin and Percocet. He argued there was no "indication in the case file as to any efforts to determine whether or not these medications had restrictions or limitations that would be, that would contraindicate any type of driving or operation of heavy machinery, no indication that this was considered for a job that involves driving, no indication as to whether or not any of these other identified conditions, regardless of whether they are work related or not, whether they carry any limitations or restrictions that would have to be taken into consideration by the employer with respect to a job offer." He stated that if a modified job offer is made, "all other conditions and limitations

¹ (It is noted that Mr. Felser was authorized to represent the claimant on January 23, 2012.)

and restriction associated with those conditions have to be taken into consideration and satisfied with respect to a modified-duty job offer.'

He stated that this case contained procedural errors; the claimant was in a sub-sedentary status, and vocational rehabilitation confirmed this job was not viable, along with documentation that driving would be contraindicated due to the medications taken by the claimant.

He stated the claimant did not improperly refuse a job as the offered job was not suitable. He stated no one asked the doctor if the claimant should take a driving job while on his prescribed medications.

The record was left open for thirty days for receipt of additional evidence for consideration

A copy of the hearing transcript was sent to the Employing Agency on January 24, 2014, for review and comment. There was no response.

I have carefully reviewed all the evidence of record in this case and find the Office's decision dated July 9, 2013, must be REVERSED.

The *FECA Procedure Manual*, Chapter 2-1200-3 (b)(1) describes correspondence with representatives and notes that 20 CFR §10.127 states that "a copy of the decision will also be mailed to the representative." The *Procedure Manual* also states that, "Copies of medical examination notices and notices of proposed decisions and final decisions should be sent to both the claimant and the authorized representative."² The *S.T.* decision, issued by the ECAB on December 16, 2011, Docket No. 11-723, stated that "OWCP did not properly issued the termination decision because it did not send a copy of that decision to the authorized representative on that date."

In the *Travis Davis* case (55 ECAB 138) (2003), the Board set aside a prior decision and remanded the file to the Office because the Office failed to send copies of a proposed suspension of compensation and a final suspension notice to the claimant's attorney. The Board found that the decision was not properly issued and noted the applicable Office regulations state:

"A properly appointed representative who is recognized by [the Office] may make a request for give direction to [the Office] regarding the claims process, including a hearing. This authority includes presenting or eliciting evidence, making arguments on facts of the law, and obtaining information contained in this part or the [Federal Employees Compensation Act] is fully satisfied if served on the representative and has the same force and effect as if it had been sent to the claimant."³

² *Procedure Manual*, Chapter 2-12—3(b)(2).

³ See 20 C.F.R. 10.700 (c). See also *Sara K. Pierce*, 51 ECAB 517, 518 (2000).

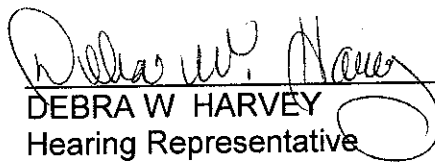
I find that the Office did provide Mr. Felser with copies of the 30-day, and 15-day letters and final decision but after the Office had formally issued these decisions. The Office changed the date on the final decision but the representative did not receive copies of the 30-day and 15-day letters in a timely manner. The failure to notify the attorney of the pending acting denied the claimant the opportunity to have an attorney assist him in avoiding termination of his compensation. As a result, the claimant was unfairly prejudiced by the omission to his detriment.⁴

Therefore, the Office's decision dated July 9, 2013, is hereby REVERSED and the file is returned to the Office for reinstatement of compensation benefits since they were not procedurally terminated. In addition, the Office should review the job offer since it involves driving and determine whether the claimant is able to drive due to his taking high levels of pain and other medications.

Further, if the claimant wishes to expand his claim to include any additional conditions, he should formally request such and the Office should undertake appropriate development.

DATED: MAR 27 2014

WASHINGTON, D.C.


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

⁴ Travis L. Chambers, Docket No 02-1650, issued April 17, 2003.