

File Number:
HR10-D-H

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U.S. DEPARTMENT OF LABOR

OCT - 7 2014

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

Date of Injury:
Employee:

Dear Ms.

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 07/29/2014. 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,



Sherri L. Doiron
Hearing Representative

PAUL H. FELSER, ESQ.
FELSER LAW FIRM
PO BOX 10267
SAVANNAH, GA 31412

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
Claimant; Employed by the in
Case No. Telephonic hearing held on July 29, 2014.*

The issue for determination is whether the claimant is entitled to compensation for wage loss from _____ to _____

The claimant, born _____, was employed as a _____ for the _____ in _____ The claimant timely filed a form CA-1, Notice of Traumatic Injury, claiming on _____, she fell from water being on the floor while walking to the elevator in the performance of her federal duties. The District Office initially accepted the claim for a right knee strain and contusion, and later expanded the claim to include right knee internal derangement; tears of the lateral meniscus of both knees; chondromalacia patellae of the bilateral knees; and osteoarthritis of the right knee. The claimant had a history of knee problems prior to her work injury. The Office authorized the claimant's _____ and _____ right knee surgeries, as well as her February 3, 2006 left knee surgery.

The claimant's surgeon, _____, M.D., released the claimant to sedentary work four hours a day effective _____

The claimant returned to work four hours a day on _____ and to six hours a day on _____. The claimant began working eight hours a day on _____ with restrictions of no running, jumping, kneeling, squatting, or stair climbing.

Dr. _____ opined on _____ that the claimant had reached maximum medical improvement for her knee. He opined the claimant had permanent work restrictions.

The claimant's other surgeon, _____ M.D. completed forms OWCP-5, Work Capacity Evaluation on _____ and _____. He limited the claimant's walking and standing to one hour a day, with no kneeling, bending, stooping, squatting, running, jumping, or stair climbing. He opined she could push, pull, and lift up to ten pounds eight hours a day.

Dr. _____ indicated in a _____ statement that the claimant had permanent work restrictions for her knee injury, and these restrictions had not changed from _____

By report dated _____, Dr. _____ noted the claimant had trace swelling and low-grade mechanical symptoms. He stated the claimant now has a cartilage disorder and a slowly progressive degenerative condition of her left knee. He opined surgery was needed in the near future due to her lack of improvement.

The claimant underwent abdominal surgery on _____ She subsequently developed a staph infection due to her surgery.

Dr. _____ requested left knee surgery on _____ The District Office authorized the surgery on _____

The claimant was unable to have knee surgery due to abdominal surgery and subsequent staph infection from _____ to the end of _____

On _____ the District Office authorized Dr. _____ to perform a second left knee arthroscopic surgery, providing a broad date range, _____ to _____ for the procedure.

Rather than proceed with left knee surgery, Dr. _____ provided the claimant with the a series of Supartz injections, the first injection being done on _____ and the fifth injection being done on _____

Dr. _____ began providing the claimant with work excuse notes for her intermittent total disability due to knee pain beginning _____

The District Office compensated the claimant for her intermittent wage loss on _____ and from _____ to _____

The claimant began filing forms CA-7, Claim for Compensation, to claim intermittent wage loss due to knee pain. The employing agency challenged the compensation claims multiple times for the reason that pain is just a symptom, and the claimant's modified duty job was sedentary.

Dr. _____ noted in his _____ report that they should be scheduling the claimant's surgery in the near future. His office requested left knee surgery on _____ He took the claimant off work on _____ pending surgery.

Although the District Office previously authorized the additional knee surgery twice, the Office informally denied the surgery request on _____ The Office requested Dr. _____ provide additional information regarding the surgery request, as _____

well as for medical rationale for why the claimant needed to be off work pending surgery. Dr. _____ acknowledged the District Office's request on _____ and noted he ordered a MRI to provide this information. He did not answer the question about the claimant's work abilities.

By letter dated _____ the employing agency contended the sedentary job that they had accommodated the claimant with since _____ would not have played a role in her developing osteoarthritis.

By letter dated _____ the District Office advised the claimant of the additional information needed to support the claimant's compensation claim.

The claimant had a left knee MRI on _____ which revealed a large knee joint effusion with a moderate-sized popliteal cyst; a thin anterior cruciate ligament that is probably developmental; early osteoarthritic changes; Grade IV chondromalacia, and a bone bruise of the medial femoral condyle.

By letter dated _____ the District Office advised the claimant that additional evidence was needed to support her compensation claim. The Office requested that Dr. _____ explain the reason for surgery.

Dr. _____ responded on _____. He acknowledged he did not examine the claimant on _____ but that she had been excused from work on a prior time. He opined the claimant could not work sedentary duty due to her knee pain and swelling; she is unable to sit for an extended period; and she is on narcotics, so it was probably not wise for her to work. He noted while the case was accepted for a lateral meniscus tear, that diagnosis was not in his medical notes going back for a significant time. He stated her surgery had been approved for her chondromalacia and arthritis; it was not just pain he was treating.

By letter dated _____ the employing agency continued to challenge the compensation claim, noting that the claimant had advised her knee surgery had been delayed due to a staph infection she received during a non-work related minor surgery.

By decision dated _____ the District Office denied the claim for compensation from _____ to _____. Specifically, the Office found that the evidence of record did not establish the claimant's disability from work was due to her accepted work injury.

By report dated _____ Dr. _____ stated the claimant was pending surgery approval. He noted the claimant was on narcotics and had to elevate, ice, and stay off her feet, and she would be out of work until six weeks after surgery.

On _____ the District Medical Advisor agreed with Dr. _____ recommendation for left knee surgery, and the District Office approved the surgery the following day.

Dr. _____ opined in a letter dated _____ that the claimant's job requires a moderate amount of ambulation, and the claimant's injuries initiated a degenerative condition that has continued with her work activities and aging. Dr. _____ opined the claimant's work activities contributed to her additional deterioration of her knees. He opined the claimant never really recovered from her first injury and she became less able to perform her activities, even with job modifications. He opined that the claimant would be limited to desk work four to five hours a day; however, he recommended medical retirement.

By decision dated _____ the District Office denied the claimant's compensation claim from _____ to _____. The Office found that Dr. _____ did not explain the objective basis for why the claimant would have been unable to work due to the accepted work injury.

By decision dated _____ the District Office denied the claimant's compensation claim from _____ to _____. The Office found that Dr. _____ did not explain the objective basis for why the claimant would have been unable to work due to the accepted work injury. The Office noted that Dr. _____ stated the claimant should have the ability to work at least four to five hours a day.

Dr. _____ performed a left knee arthroscopy with chondroplasty for the claimant on _____.

The District Office placed the claimant on the periodic compensation rolls on _____.

By decision dated _____ the District Office denied the compensation claim from _____ to _____. The Office again found that Dr. _____ failed to provide adequate medical rationale to support the claimant's disability from work.

The claimant disagreed with the decisions dated _____ and _____ and requested a hearing before an OWCP Hearing Representative. Accordingly, the claimant's telephonic hearing was scheduled and held on _____. The claimant was not present at the hearing, but her attorney, Paul Felser, represented the claimant at the hearing. _____ was present for the employing agency in an observation capacity.

At the hearing, Mr. Felser stated the claimant did not take sick or annual leave during the period compensation was claimed from _____ to _____.

Mr. Felser contended Dr. _____ addressed the District Office's question about why the claimant had been unable to work her sedentary desk job during the claimed compensation period. He stated in his _____ report, Dr. _____ said the claimant has a job that is not entirely sedentary and she was unable to sit at a desk for an extended period due to pain and swelling, and in addition, she was on narcotic pain

medicine, which was probably not wise for her to be at work on narcotics. Mr. Felser argued the employing agency and the District Office did not address how these restrictions could be accommodated.

Mr. Felser stated the reason that surgery was requested in _____ was because it was a temporary situation and no longer an issue.

Mr. Felser contended that while the District Office's decisions continue to say the doctor did not provide a firm diagnosis, he stated Dr. _____ gives a firm diagnosis in his report: left knee chondromalacia and arthritis. Mr. Felser stated there had been no inconsistency or deficiency in Dr. _____ report, the Office just ignored it.

Regarding when the claimant's staph infection occurred, how serious it was, and whether it was the cause of her disability, Mr. Felser stated they would provide documentation. Mr. Felser contended that the brief staph infection did not cause the claimant's disability.

It was requested that the claimant describe her day-to-day job duties at the time she had stopped work, in reference to the inconsistency of the employing agency's statement that the claimant's job is sedentary and Dr. _____ statement that the claimant's job requires moderate ambulation. Mr. Felser responded that he could get that statement, but noted that Dr. _____ said being on narcotics was another impediment to her work duties. Mr. Felser also stated that all non-work related conditions have to be taken into consideration for modified duty, and absent suitable modified duty employment, the claimant is entitled to compensation. Mr. Felser argued the claimant clearly couldn't do her regular duty under the circumstances. Mr. Felser also referenced Dr. _____ report to support he had been consistent in reporting the claimant's condition.

In reference to Dr. _____ opinion about the claimant working while taking narcotics, it was pointed out to Mr. Felser at the hearing that the claimant had been working while prescribed the narcotic hydrocodone on _____ prior to her stopping work. Mr. Felser referenced an _____ prescription information sheet, showing the claimant's prescriptions included hydrocodone, oxycodone, Lidoderm patch, and Lortab, and Dr. _____ stated the claimant probably shouldn't be working.

During the hearing, the claimant was advised through Mr. Felser of the evidence needed to establish the claim.

A copy of the transcript was sent to the employing agency for review and comment. The employing agency provided comments dated _____ from Ms. _____ Ms. _____ stated they received medical documentation on _____ dated _____ but this information was insufficient to support total incapacity from the claimant's light duty position, and noted that the District Office did not approve the claimant's surgery. She stated there was no harassment, but they are required by law to establish disability from work for the entire period, and the only evidence received

was one sentence from the claimant's physician to support compensation. The agency noted they work diligently to assign work within medical restrictions, up to bed rest if needed. Ms. [redacted] referenced the discussion of the claimant's being unable to work due to her taking narcotics for her pain, but she referenced enclosed the AQS (Agency Query System) web bill processing portal printouts that showed no pharmacy bills for narcotics or other medicines. Ms. [redacted] noted the report dated [redacted] was the first mention of narcotic medications, and at the claimant's hearing, it was mentioned that the claimant does not take narcotics while she had been working. Ms. [redacted] contended that there had been no demonstrated increase or change in her medications. Ms. [redacted] enclosed an e-mail dated [redacted] to the claimant from her Supervisor requesting updated medical documents, and the claimant's union representative, Mr. [redacted] had been copied on the request, and both he and the claimant responded that she could not have the surgery previously, because she had staph infection in her abdomen, and Dr. [redacted] was waiting for clearance from her doctor before proceeding with her work-related surgery. Ms. [redacted] stated the Agency did not receive a copy of the medical document Mr. Felser referenced dated [redacted] and noted they challenged the compensation claim based on the medical documents they did receive from the claimant, which only denoted pain.

Ms. [redacted] provided the performance standards for the Alternate Controlled Coordinator, noting the claimant had performed this permanent light duty position since [redacted]. She noted this assignment should typically not take more than 1 to 1.5 hours in any given duty day, and abided by the medical restrictions outlined as walking/standing for 1 hour, no bending, stooping, squatting, kneeling or climbing; no pushing, pulling, and no lifting over ten pounds over a six hour day. She noted the duties involved sporadic, short-distance walking, usually not more than five to ten minutes; occasional standing and reaching in order to reach files, but no more than would be expected of routinely sedentary desk-type job. She noted the primary duties are performed sitting and operating a computer in a secretarial/clinical capacity. Ms. [redacted] noted the agency also accommodated the claimant with a special parking space as well as a foot rest to elevate her feet. Ms. [redacted] concluded that the agency did not believe the claimant provided any conclusive evidence to support entitlement to compensation for her periods of leave without pay during the periods mentioned.

The record was held open for thirty days to allow for the submission of additional evidence. The following evidence was received: a [redacted] physical therapy report and medical list; reports from Dr. [redacted] dated [redacted] Dr. [redacted] and [redacted] off work excuse slips; a report dated [redacted] M.D.; a report dated [redacted] from [redacted] M.D.; and two statements from claimant received on [redacted] No medical evidence concerning the period of disability from [redacted] to [redacted] was received.

On [redacted] Dr. [redacted] released the claimant to work with permanent work restrictions two hours a day.

On [redacted] the employing agency advised the claimant that they had a job offer within her permanent two hour a day work restrictions given by Dr. [redacted] and requested she provide them with an updated résumé.

On [redacted] Dr. [redacted] advised the claimant was unable to work through [redacted] By letter of the same date, the District Office requested Dr. [redacted] provide medical rationale to support the claimant was unable to work.

Dr. [redacted] noted the claimant is his patient who had a gastric bypass surgery several years ago, and in [redacted] she underwent an abdominoplasty. He stated she developed a wound infection and separation of the wound in early [redacted] that took several months to heal. He stated it was completely healed as of [redacted] and he did not see any reason she could not have had her knee surgery in [redacted] but because of other delays, she ended up having her knee surgery on [redacted]

Dr. [redacted] described the claimant's medical and surgical history. He noted the claimant was overweight. He stated the claimant was diffusely tender about her knee, but she had no effusion, her knee was stable, and she had painless motion of her right hip. He stated her right knee-x-rays showed her joint spaces were well-maintained with minimal degenerative changes. He diagnosed possible complex regional pain syndrome of the right knee, although he did not identify what objective findings the claimant had to warrant this speculative diagnosis. Dr. [redacted] opined that a total knee replacement would not solve the claimant's pain.

The claimant stated in her job as [redacted] she did chart reviews, and she would go to either the uptown or downtown division to pick up the documents she needed for the chart reviews, as well as to train the controlled substance inspectors and the new chart reviewers. She stated these areas are not near her office. She stated she took vital signs for mental health outpatients, which required that she reposition her chair, and this could be ten to fifteen times a day. She stated several times a day she had to go find patient's physicians to communicate. She stated she would get up at least four times a day to show patients directions. She stated in [redacted] when the controlled substance coordinator retired, she was handed the entire program and had to work with all the inspectors, and had to take memos to the Director's secretary, which was at the opposite end from her office, which is a half a mile there and back once or twice a day. She stated it was 120 feet from her office to the training area. She stated she would have to go to the downtown medical center to assist in meetings. She claimed there was considerable walking from [redacted] to [redacted] due to all the reports, and picking up or dropping off information. She stated the pharmacy was 200 feet from her office and the second floor and the handicap parking was over 600 feet from her office, with another 300 feet to the director's office. She stated the closest restroom was thirty feet away, and she had to walk daily 100 feet to warm up her lunch. She claimed she got up at least fifteen times a day to get to her file cabinet. She stated there had been a controlled substance coordinator detailed, but she never took over the program fully until after [redacted]

In the claimant's second statement, she alleged the employing agency had been retaliatory and aggressively tried to have her compensation claims denied. She contended her job was not entirely sedentary. She contended her staph infection was unrelated to her disability, or that it delayed her knee surgery. She noted Dr. supported her claim. She stated Dr. did prescribe narcotics, but she would not take them at work, but she utilized non-narcotic Lidoderm patches.

Based upon hearing testimony, together with the written evidence of record, I find that the decisions of the District Office dated and should be set aside and remanded for further development, based upon the additional medical evidence and statements the claimant submitted after her hearing.

Disability under the FECA generally means inability to earn the wage the employee was receiving when injured.¹ As used in the FECA, the term "disability" means the incapacity because of an injury in employment to earn the wages the employee was receiving at the time of the injury; i.e., a physical impairment resulting in loss of wage-earning capacity.²

The claimant, for each period of disability claimed, has the burden of proving by a preponderance of the reliable, probative and substantial evidence that he is disabled for work as a result of his employment injury. Whether a particular injury caused an employee to be disabled for employment and the duration of that disability are medical issues which must be provide by preponderance of the reliable probative and substantial medical evidence.³

In the present claim, Dr. opined the claimant had been unable to work beginning due to pain and swelling; she could not sit for extended periods; because her job was moderately ambulatory; and because she should probably not work while on narcotics. While the employing agency continues to challenge the compensation claim for the reason that the claimant's job is sedentary, the claimant provided a statement detailing how much her job required her to stand and walk. I find that the District Office should provide the claimant's statement to the employing agency for comments, due to the discrepancy involving exactly how much standing and walking the claimant's position requires. At the time the claimant stopped work, she had permanent work restrictions of no walking or standing over one hour a day. It is unclear from the claimant's position description, the employing agency's challenge, and the claimant's statement exactly how much standing and walking the claimant does over the course of a work day in her position.

Upon return of the case record, the District Office should provide the claimant's statement to the employing agency for comments, and ask that they explain any points of disagreement. The Office should ask that the agency specify if her work duties would

¹ *Alfonso G. Montoya*, 44 ECAB (Docket No. 92-570, issued October 30, 1992).

² *Pedro Beltran*, 44 ECAB (Docket No. 92-728, issued November 13, 1992).

³ *Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

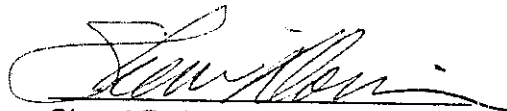
entail standing and walking more than one hour a day. The Office should then update their Statement of Accepted Facts (SOAF) to describe the duties and physical demands of the Alternate Controlled Substances Coordinator position that the claimant has been accommodated with since [redacted]. The Office should note in the SOAF that the employing agency provided the claimant a special parking space and a foot rest to elevate her feet. The Office should also note the additional medical conditions that they expanded the claim to include since their last SOAF in the case record, as well as to note that they authorized the claimant's second left knee surgery.

The District Office should then refer the updated SOAF to Dr. [redacted] and ask that he explain, based on the claimant's contemporaneous objective medical findings, how the claimant's work injury would have prevented her from working the Alternate Controlled Substances Coordinator position from [redacted] to [redacted]. The Office should ask that Dr. [redacted] provide medical rationale for his opinion, and ask that he specifically explain what duty, or duties, the claimant's work injury would prevent her from doing from [redacted] to [redacted].

Following completion of any further development the Office deems necessary, it should issue a *de novo* decision on the claim.

Consistent with the above findings, the decisions of the District Office dated [redacted] and [redacted] are set aside, and the case file is REMANDED for further action as described above.

Date: OCT - 7 2014
Washington, D.C.



Sherri Doiron
Hearing Representative
for
Director, Office of Workers'
Compensation Programs