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

JUN 15 2010

Date of Injury:
Employee:

RECEIVED JUN 21 2010

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 02/22/2010. 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

DEPARTMENT OF HOMELAND SECURITY
TRANSPORTATION SECURITY ADMN
ORLANDO INTERNATIONAL AIRPORT
5850 T G LEE BOULEVARD, SUITE 610
ORLANDO, FL 32822

PAUL H. FELSER
7 EAST CONGRESS ST, SUITE 400
PO BOX 10267
SAVANNAH, GA 31412

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 Department of Homeland Security, Orlando, Florida. Case No Hearing was held on February 22, 2010, in Jacksonville, Florida*

The issue is whether the District Office properly reduced compensation benefits, finding the claimant is capable of performing the duties of insurance clerk and/or medical voucher clerk.

The claimant, date of birth, , was employed by the Department of Homeland Security, TSA, Orlando, Florida, as a Security Screener. She filed the Form CA-1, Notice of Traumatic Injury, on January 15, 2003, when she tripped and fell over a bin, dislocating her right shoulder. The claim has been accepted for a dislocated shoulder, as well as a right superior glenoid labrium lesion. She underwent right shoulder arthroscopy with repair of the labrium and a distal clavicle resection on January 6, 2005. She was placed in receipt of compensation benefits for wage loss.

The District Office was advised that TSA could not offer her employment within the restrictions provided by her Attending Physician, Dr. Sean McFadden. She was enrolled in vocational rehabilitation services and completed an Associate's Degree program in medical administration. She was then offered 90 days placement services. On February 3, 2009, the Office receipted updated restrictions from Dr. McFadden that indicated she could return to full duty.

The Office issued a Notice of Proposed Termination of Benefits on March 12, 2009. However, on May 22, 2009, the Office determined Dr. McFadden had failed to identify the number of pounds the claimant could lift. The Office contacted the physician's office and was advised the lifting restriction remained 20 pounds, which precluded her resuming her date of injury job. The Office then determined she could perform the selected positions of Insurance Clerk or Medical Voucher Clerk as a result of vocational rehabilitation.

On May 22, 2009, the Office then issued a proposed reduction of benefits, finding the selected positions of Insurance Clerk, DOT # 214.362-022, and Medical Voucher Clerk, DOT # 214.482-018, were suitable. She was given 30 days to provide supporting evidence if she disagreed with the proposed reduction of benefits. Her Attorney, Paul Felser, provided the argument that these positions were not suitable with respect to the entirety of her medical conditions and there was no current medical evidence that assessed her current functional capacity. The District Office, however, finalized the

termination of benefits on September 14, 2009, finding the weight of medical evidence lay with Dr. McFadden's February 2009, work restrictions. The claimant disagreed with this decision and, through Mr. Felser, requested an oral hearing before an OWCP Hearing Representative.

The hearing was held on February 22, 2010, in Jacksonville, Florida. The claimant was not present but was represented by Mr. Felser, who again argued that the medical evidence upon which the reduction of benefits was based was too old to have probative value; that the claimant's total medical condition had not been taken into consideration, and that an accurate labor market survey had not been undertaken. The record was left open for 30 days for receipt of additional evidence for consideration.

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

"The CE [Claims Examiner] is responsible for determining whether the medical evidence establishes that the claimant is able to perform the job, taking into consideration medical conditions due to the accepted work-related injury or disease, and any pre-existing medical conditions. (Medical conditions arising subsequent to the work-related injury or disease will not be considered.) If the medical evidence is not clear and unequivocal, the CE will seek medical advice from the DMA, treating physician, or second opinion specialist as appropriate.[1]"

Mr. Felser submitted the following medical reports to support his contention that the claimant's medical condition had not been considered in whole:

> The Functional Capacity Evaluation report, dated October 12, 2005;
> EKG reports, some of which are undated, and dated reports from January 6, 2005, through March 16, 2009;
> Reports and progress notes from treating physicians, Drs. Anil Patel and Arsenio Mestre, from January 22, 2003, through April 7, 2010;
> Laboratory reports from April 9, 2003, through March 17, 2009;
> Diagnostic testing to include January 5, 2004, and January 5, 2006 pelvic ultrasounds that showed uterine fibroids, left lower extremity Doppler examination report of September 13, 2004, that was negative, September 21, 2004, echogram that was normal, November 10, 2004, abdominal ultrasound that showed a mildly fatty liver, March 9, 2005 endoscopy that showed swallowing of excessive air, normal mammograms, pulmonary function tests of January 16, 2006, and September 17, 2008, that were normal, reports from Dr. Robert Baher, gastroenterologist, from February 8, 2006, and March 1, 2006, for abdominal pain with a normal abdominal ultrasound and benign colon polyps, a September 8, 2006, CT scan of the brain that was normal, December 21, 2006, echocardiogram and Doppler reports that showed mild left ventricular hypertrophy, mild left atrial

[1] FECA *Procedure Manual*, Chapter 2-0814-8 (d).

enlargement, and trace mitral regurgitation, normal bone density studies of September 7, 2007, negative echocardiogram and coronary stress test of July 3, 2008;
Shoulder surgery operative report of March 26, 2004, and
August 3, 2006, report from Bedford Medical Center, Ohio, for evaluation of mild hypertension.

While these reports showed the claimant was treated for multiple complaints over the years, none show that she had any condition that pre-existed the January 15, 2003, employment injury that prevented her from assuming the modified duty job in which she was rated.

Dr. Mestre provided an April 7, 2010, medical report stating he had been treating the claimant since September 6, 2001. He noted the employment injury of January 15, 2003, that caused a right shoulder injury with surgical repair. "Preceding this, and appearing to have originated in approximately 1999, patient has suffered from coccygodynia and S1 joint dysfunction. Subsequent to her injury she has also been suffering from increased stress, anxiety and depressive symptomatology, which has required the use of antidepressants and counseling." He stated that secondary to her injury and coccygodynia, "I believe that she is limited in her ability to perform computing, typing, writing and calculating machines, as well as any task that would require prolonged sitting." The stress, anxiety, and depression cannot be considered, pursuant to the *Procedure Manual*, cited above since these conditions developed after the employment injury. While Dr. Mestre stated the claimant was treated for coccygodynia and the S1 joint dysfunction that renders her unable to perform computer and office work or to sit for long periods, there is no medical evidence in the file prior to this April 2010 report that mentions these conditions. There is no evidence she was treated for these conditions and no evidence that they have caused her any problems in the past. There is no evidence these conditions rendered her unable to sit for extended periods of time. The record is devoid of treatment notes for these conditions and there is no evidence the claimant was ever placed on restrictions due to them. She was able to work a job as a transportation screener and was able to complete college with no report of treatment for any low back problem. I find there is no basis to reverse the rating based on pre-existing medical conditions.

I also find that the labor market survey for the Insurance Clerk position is sufficient to establish it is available in the claimant's commuting area. The *Procedure Manual* states that a statement from the Rehabilitation Counselor should be provided "which addresses reasonable availability of the jobs in that area."[2] The *Procedure Manual* also states the "availability of the employment is usually evaluated with respect to the area where the injured employee resides at the time the determination is made, rather than the area of residence at the time of injury." The determination was made in April 2009 as the claimant resided in Orlando, Florida, on that date. The Rehabilitation Counselor stated there were 87 annual openings for Insurance Clerks in Orlando, Florida. The

[2] FECA *Procedure Manual,* Chapter 2-0814-8 (d).

Rehabilitation Counselor, however, did not provide the number of openings for the Medical Voucher Clerk position. I find that there are enough openings for Insurance Clerks to explore the suitability of this position.

The final argument made by Mr. Felser concerns Dr. McFadden's medical reports. The last report of examination by Dr. McFadden was August 22, 2006, when he stated there was little he could do about the continuing shoulder pain. He stated the claimant was to follow up with him on an as needed basis. Dr. McFadden also submitted a lengthy narrative medical report that stated it was "as of 12/22/06." Dr. McFadden stated the claimant had reached maximum medical improvement and he provided work restrictions of no heavy lifting (greater than 10 pounds) or repetitive work." He noted that this was a permanent restriction.

On January 23, 2009, the Office wrote Dr. McFadden for a progress report and work restrictions. On February 3, 2009, Dr. McFadden returned the completed Form OWCP-5, Work Capacity Evaluation, stating the claimant could work her usual job. The only restriction provided was a lifting restriction of 2-4 hours per day as well as a limitation on reaching above the shoulder. Dr. McFadden provided no narrative report, nor did he explain why he had changed his work restrictions or what happened to the claimant in the interval between August 22, 2006, and February 3, 2009. There is no evidence the claimant was examined before he completed the February 3, 2009, work restrictions. On May 12, 2009, the Claims Examiner documented a telephone call to Dr. McFadden's office. The Claims Examiner stated she spoke to a "Kim D" who "asked me to fax her a copy of the form. She called me back later this afternoon and said the claimant was last seen in 2006. Dr. McFadden reviewed her records before completing the form. I noticed that because of a bronzing problem, the form they received did not list the number of pounds for restrictions on lifting. We discussed that she had an FCE back in 2005 and the dr had given her permanent lifting restrictions of 20 pounds based on this test. Kim advised that that restriction would not have changed. She advised that he could not reassess her restrictions without a new FCE." There is no evidence in the case file that this evidence received over the phone was followed up with written documentation signed by Dr. McFadden. The *Procedure Manual* states, "The telephone may be used to schedule examinations, request reports, and address other administrative matters. However, long-standing ECAB precedent provides that oral statements of doctors to OWCP personnel do not constitute competent medical evidence (see John M. Fuller, 9 ECAB 320)."[3]

The faxed document was in the case file, along with a copy of Dr. McFadden's work restrictions of November 2, 2005, in which Dr. McFadden stated the claimant's restrictions were on the FCE. He annotated this form with "no repetitive motion."

Under section 8115(a), wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent his or her wage-earning capacity, or if the employee has no actual earnings, his or her wage-earning

[3] FECA *Procedure Manual*, Chapter 2-0800-11 (b)

capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment, and other factors and circumstances which may affect wage-earning capacity in his or her disabled condition.[4]

In this case, Dr. McFadden stated in 2005 his work restrictions were based on the FCE, which stated the claimant could work at the sedentary to light level. He stated she was not to engage in repetitive motion activities. In 2006, after he had discharged her from his care, he stated in the written narrative she was unable to lift over 10 pounds nor engage in repetitive work. However, in the work restrictions of 2009, he stated the claimant could work with restrictions of no reaching over the shoulder and lifting 2-4 hours per day. He did not state the pounds the claimant could lift and the Office contacted Dr. McFadden's office by telephone for clarification. The person who answered the phone said the lifting restriction was 20 pounds, per the FCE, without any written confirmation by Dr. McFadden or any reasoning why his work restrictions changed. The claimant has argued that Dr. McFadden had not examined her since 2006 and there is no report of examination that contains objective findings from Dr. McFadden to support why he changed his work restrictions in 2009. Basically, there is a conflict in Dr. McFadden's work restrictions concerning the number of pounds the claimant could lift and whether she could perform repetitive type work. The DOT descriptions of both the Insurance Clerk and the Medical Voucher Clerk stated the work situations require, "Performing Repetitive or Short-cycle Work."

I find the Office prematurely reduced the claimant's compensation benefits. Dr. McFadden's work restrictions are contradictory and the selected position(s) may not be within his work restrictions. Thus, the Office's decision dated September 14, 2009, must be REVERSED since it is unknown if the selected position(s) are within her work restrictions. Clarification of the work restrictions should have been obtained from Dr. McFadden, in writing, and based on a current examination prior to the rating. The conflict in his work restrictions between 2006 and 2009 should have been addressed. At this time, since the claimant is in receipt of OPM benefits, an election must be given back to the date of the reduction of benefits.

DATED: JUN 15 2010

WASHINGTON, D.C.

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

[4] *Karen L. Lonon-Jones*, 50 ECAB ___ (Docket No. 97-155, issued March 18, 1999)