

File Number:
HR12-D-H

RECEIVED MAY 07 2014

U.S. DEPARTMENT OF LABOR

APR 30 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.

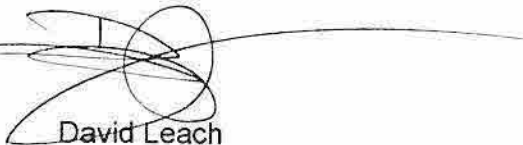
This is in reference to your workers' compensation claim. Pursuant to your request for a hearing, the case file was transferred to the Branch of Hearings and Review.

A hearing was held on 02/11/2014. 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,



David Leach
Hearing Representative

PAUL H FELSER
ATTORNEY AT LAW
P O 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.C. Code 8101 et seq. of _____ claimant; Employed by the _____ in _____ ; Case no. _____

Hearing was held by telephone on February 11, 2014. As a result, the decision of the Office dated July 26, 2013 is hereby set aside, for the reasons set forth below:

The issue for determination is whether the Office met its burden when it terminated the claimant's medical and wage-loss compensation.

The Office accepted that the claimant sustained a work-related injury in the performance of duty on _____ working as a _____. At that time, the claimant was installing panels and received an electric shock. He struck his head and lost consciousness. The claim was approved for the following work-related medical conditions: laceration of the eye; laceration of the nose; and electric shock.

On _____ the Office expanded the claim to include a cognitive disorder resulting from the work injury. The Office accepted that this condition resulted in the claimant's inability to perform his duties as an electrician, and led to termination of his position with the _____. The claimant received ongoing wage-loss compensation on the OWCP "Periodic Roll" due to time missed from work as a result of the accepted injury.

On _____ the Office adjusted the claimant's compensation based on his ability to earn \$122.70 per week as a _____

On _____ the claimant was referred for a directed "second opinion" examination, for assessment of the accepted, work-related injury. The claimant was seen by _____ MD, a Board-certified Neurologist. Dr. _____ received a copy of the Statement of Accepted Facts (SOAF) and copies of the medical records of file, to be used as a basis for his examination and medical opinion. Dr. _____ performed a physical examination of the claimant, which was described in his report. Dr. _____ opined the claimant's accepted work injuries had fully resolved. He also indicated that he felt the claimant was capable of performing the physical requirements of his pre-injury position.

Dr. [redacted] explained the basis for his conclusion. He noted that the claimant complained of memory loss for more than 13 years, but had been able to live by himself and lead a normal life. He was able to perform all activities of daily living without trouble. He was able to maintain his accounts and pay bills without trouble. The neurological examination was pretty much unremarkable, except for inability to recall, which could be subjective. His mild unsteady gait was due to an old injury. The CT scan of the head taken immediately after the injury was normal. He had 2 MRI tests, which both showed white matter disease with hydrocephalus. His neuropsychological examination failed to reveal any signs of dementia.

On [redacted] the District Office released a pre-termination notice to the claimant, advising of the intention of the Office to terminate medical and wage-loss compensation benefits, on the basis that the weight of medical evidence, represented by the opinion of the second opinion physician, Dr. [redacted] supported that he was no longer suffering from the effect of the accepted work injury and no longer disabled from work. The claimant was afforded 30 days to provide evidence or argument against the proposed termination action.

In response to the pre-termination notice, a letter from the claimant was received, arguing against the proposed termination of his compensation benefits on the basis that he was still suffering from the work injury and still unable to work.

On July 26, 2013, the District Office issued a formal decision terminating the claimant's medical and wage-loss compensation benefits. The Office found that the weight of medical evidence rested with Dr. [redacted] the second opinion physician, and supported that the claimant was no longer suffering from the effects of the accepted work injury, and was no longer disabled from work. There was no reasonably current medical opinion of record from the attending physicians, supporting that the claimant was still suffering from the accepted work injury. The evidence provided by the claimant in response to the pre-termination notice was found insufficient to establish he was still suffering from the work injury.

The claimant disagreed with this decision and requested an appeal in the form of an Oral Hearing before the Branch of Hearings and Review. A Hearing was held by telephone on February 11, 2014. The claimant did not appear for the Hearing, but in his place, his authorized representative, Attorney Paul Felser, offered argument on the record. There was no representative from the employing agency present to observe the proceedings.

Attorney Felser argued that the opinion of Dr. [redacted] was not sufficient to carry the weight of medical evidence, or to justify termination of the claimant's benefits, as it was not well-reasoned, and not based on an accurate history of injury. It was not consistent with the reported findings of prior physicians of record. He also

argued that there were deficiencies in the Statement of Accepted Facts that was provided to Dr. _____ to use as a basis for his medical opinion.

Attorney Felser argued that, in reading Dr. _____ report, he failed to discuss or identify the specific medical records he reviewed from the claimant's file. The SOAF also failed to identify any specific medical treatment or testing that was done. Dr. _____ did not identify specifically which neuropsychological testing that he reviewed; however, there are reports of this nature in the file which support the claimant had ongoing memory loss.

Attorney Felser noted that the claim had been accepted for a work-related cognitive disorder in _____ that prevented him from performing his duties as an electrician, but this was not mentioned in the SOAF. Attorney Felser argued that as medical opinion based on an incomplete SOAF was of little probative value under the Act.

Attorney Felser argued that the rationale provided by Dr. _____ in support of his medical opinion was vague and not supportive of his conclusions. He performed a brief examination, hardly any discussion of the medical records, and provided his opinion that the claimant was no longer disabled from work because he had been able to handle his daily living activities. Attorney Felser argued that the mere fact the claimant could perform his activities of daily living, alone, was not sufficient reasoning for Dr. _____ to determine the claimant was able to work. A CT scan or MRI would not be able to show whether the claimant had memory loss.

Attorney Felser argued that the Office failed to take appropriate steps after a prior second opinion physician, Dr. _____, recommended the claimant was not capable of performing his duties as an electrician due to memory difficulty, underlying depression and residual weakness on the right side. It was not clear why the Office did not expand the claim to include these additional medical conditions as work-related. Dr. _____ did not discuss the report of Dr. _____ or address why his conclusions were different from those of Dr. _____, or what had changed in the claimant's condition since Dr. _____ had examined the claimant and found him disabled due to residuals of the accepted work injury.

Attorney Felser noted that neuropsychological examinations from _____ showed severe deficits in olfactory function, indicative of orbital frontal injury. Also mild to moderate deficit in immediate memory were documented. A second opinion report from Dr. _____ dated _____ indicated the claimant was suffering from post-traumatic, post-concussive syndrome, and post-traumatic vestibulopathy. This was consistent with what was reported by the attending physician. It was unclear why, at that time, the Office failed to expand the claim to include these additional medical conditions caused by the work injury.

Attorney Felser indicated it was his intention to provide additional medical evidence to support the claimant was still disabled by the accepted work injury. He asked that the record remain open for 30 days, to allow for the opportunity to submit such a report. The request was granted, and the record held open.

Following the conclusion of the Hearing, copies of the transcript were released to the claimant and the employer, and their comments were invited. As of this date, no additional information relevant to the issue under consideration has been received from the employer.

Additional medical evidence was received to the record.

In a report dated _____ Dr. _____ indicated that the claimant performed a battery of psychological evaluations that supported the claimant was suffering from significant memory loss. Dr. _____ advised it was his opinion that the memory problems were caused by significant brain damage due to severe electric shock in _____. As a result, Dr. _____ provided a diagnosis of Mild Neurocognitive Disorder due to traumatic injury and a diagnosis to rule out: dementia due to electrocution. The claimant was previously assessed in _____ and his memory had not improved since that time. Dr. _____ opined the claimant's condition was permanent, and prevented him from performing all but the simplest jobs. Dr. _____ provided a detailed narrative report containing his psychological test results, dated _____ in support of his conclusions.

Based on my careful consideration of the evidence of record at this time, I find the decision of the Office terminating the claimant's medical and wage-loss compensation must be set aside. The Office failed to meet its burden of proof when it relied on the opinion of Dr. _____ to justify termination of these benefits.

Once the Office accepts a claim, it has the burden of proof to justify a termination or modification of compensation benefits.¹ After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.²

On July 26, 2013 the Office terminated wage-loss compensation and medical benefits on the grounds that the weight of medical evidence supported that the accepted work-related conditions had resolved and the claimant was no longer disabled from work. To justify the termination of benefits, the Office relied on the opinion of Dr. _____ a Board-certified Neurologist, as the weight of medical evidence.

¹ *Harold S. McGough*, 36 ECAB 332 (1984).

² *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

It is noted that Dr. _____ was provided a Statement of Accepted Facts (SOAF) to use as a basis for his medical opinion. As argued by Attorney Felser at the Hearing, the SOAF used by Dr. _____ as a basis for his medical opinion was deficient, in that it failed to identify all the accepted, work-related medical conditions under the current claim. Specifically, the Office expanded the claim in _____ to include a cognitive disorder that prevented the claimant from performing his work as an electrician. The SOAF does not list this as an accepted, work-related medical condition.

The Office provides a physician with a SOAF to assure that the medical specialist's report is based upon a proper factual background.³ The SOAF must include the date of injury, claimant's age, the job held on the date of injury, the employer, the mechanism of injury and the claimed or accepted conditions.⁴ Office procedures further indicate that, when an Office medical adviser, second opinion specialist or referee physician "renders a medical opinion based on a SOAF which is incomplete or inaccurate or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether."⁵

As argued by Attorney Felser, I find the probative value of the opinion of Dr. _____ is further diminished in that he failed to specifically identify the medical records he reviewed, and used as a basis for his opinion. Dr. _____ medical reasoning, that the claimant is able to function as an electrician because he appears to have no difficulty with his activities of daily living, appears flawed and speculative, and contrary to the neuropsychological testing of record. Dr. _____ opinion that the claimant's accepted work injury has resolved is not sufficiently reasoned, and unsupported by the additional medical reports of record.

The Board has held that medical conclusions unsupported by rationale are of little probative value.⁶ A physician's opinion on causal relationship must be one of reasonable medical certainty, but it must also be supported with affirmative evidence, explained by medical rationale and based on a complete and accurate medical and factual background.⁷

On appeal, the claimant provided psychological test results and a report from Dr. _____ a psychologist, supporting that he still suffers from significant memory loss due to the accepted work injury and is unable to work as an electrician due to the effect of the work injury.

³ *Helen Casillas*, 46 ECAB 1044 (1995).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statements of Accepted Facts*, Chapter 2.809.12 (June 1995); see also *Darletha Coleman*, 55 ECAB _____ (Docket No. 03-868, issued November 10, 2003).

⁵ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990).

⁶ *Ceferino L. Gonzales*, 32 ECAB 1591 (1981); *George Randolph Taylor*, 6 ECAB 968 (1954).

⁷ *Connie Johns*, 44 ECAB 560 (1993). See generally *Melvina Jackson*, 38 ECAB 443, 450 (1987) (discussing the factors that bear on the probative value of medical opinions).

In sum, the Office failed to meet its burden when it terminated the claimant's compensation and medical benefits based on the medical opinion of Dr. [redacted] for the reasons noted above. The decision of the Office dated July 26, 2013 must therefore set aside, and the claimant's compensation and medical benefits reinstated.

The Office is obligated to obtain an opinion from Dr. [redacted] that is sufficient to resolve the issues currently under consideration. As such, the Office should write to Dr. [redacted] and request a supplemental medical report. Dr. [redacted] should be provided a corrected version of the Statement of Accepted Facts, including all the accepted medical conditions under the current claim, and should be advised that the claim was expanded in [redacted] to include a cognitive disorder that prevented the claimant from performing his prior work as an electrician.

The new medical records provided by on appeal by Dr. [redacted] should also be provided to Dr. [redacted] and he should be advised to review these documents and comment on them. The Office should also provide a copy of the prior medical records of file to Dr. [redacted] for his reference, including copies of prior test results and second opinion examination reports.

In his supplemental report, Dr. [redacted] should explain whether, in view of the evidence of record, including the updated SOAF and current psychological testing, he still believes the accepted work injury has resolved. If Dr. [redacted] feels that the claimant is not currently suffering residuals of the accepted work injury, he should provide rationale to explain the basis for this conclusion; and cite any specific medical evidence of record that supports it. He should clearly identify these medical records by date, author and a sufficient description of the relevant findings therein.

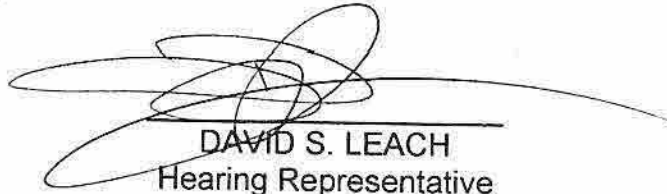
Dr. [redacted] should also be asked to explain whether he believes the claimant is disabled from work as an electrician due to the effect of the accepted work injury or accepted medical conditions under the current claim. If Dr. [redacted] opines the claimant is no longer disabled, and capable of working in his pre-injury job as an electrician, he must address how he arrived at this conclusion, and specifically discuss whether the claimant is able to perform the physical requirements of the job, as well as whether the claimant is cognitively able to function as an electrician; and what specific evidence of record supports this.

Once the supplemental report is received from Dr. [redacted], the Office should undertake any additional development of the evidence, such as it finds warranted, and issue a *de novo* decision on whether the claimant is still suffering from the effects of the accepted work injury; or whether termination of the claimant's wage-loss compensation and/or medical benefits under the current claim is warranted. The Office should also consider whether expansion of the claim to include additional work-related medical conditions is warranted.

Since the Office failed to meet its burden of proof when it terminated the claimant's compensation and medical benefits; the claimant is entitled to reinstatement of these benefits, retroactive, back to the date of termination.

The decision of July 26, 2103 is hereby set aside, and the case is remanded to the District Office for actions consistent with this decision.

Dated: APR 30 2014
Washington, D.C.

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

DAVID S. LEACH
Hearing Representative
for
Director, Office of Workers'
Compensation Programs