

File Number
HR12-D-H

RECEIVED SEP 19 2016

U.S. DEPARTMENT OF LABOR

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 07/12/2016. 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

Signed Electronically,

Michael McCalley
Hearing Representative

PAUL H FELSER
FELSER LAW FIRM, PC
QUEENSBOROUGH BANK BUILDING
7393 HODGSON MEMORIAL DRIVE
SUITE 102
SAVANNAH, GA 31406

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.

Washington DC, September 14, 2016

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; Case No.
Telephone Hearing held on July 12, 2016.*

The issue for determination to be determined is whether the Office's sanction which terminated the claimant's entitlement to further compensation benefits and schedule award was correct and appropriate.

born worked as a for the
Ms. a Traumatic Injury Notice under case
on for an incident from On that date,
Ms. was working at the check point area in the front lobby on the ground floor of the
VA Medical Center. When a patient fainted, Ms. tried to hold him up to avoid injury
when she experienced strain in her back plus pain in her arms and legs.

The District office accepted Ms. claims for:

- LUMBOSACRAL STRAIN/SPRAIN
- DISPLACED LUMBAR DISK

Pre-existing or concurrent medical conditions include:

Type 2 diabetes, arterial hypertension, systemic Lupus Erythematosus (SLE), Transient Ischemic Attack (TIA or stroke), Obesity, Rheumatic Disease, Chronic Obstructive Pulmonary Disease (COPD), Carpal Tunnel Syndrome (CTS), and lumbosacral neuritis unspecified.

Ms. is not noted to have worked beyond Ms. relocated
from to in.

Ms. has undergone the following:

- Bone Mineral Density study on
- EMG/NCV testing of the bilateral upper and lower extremities on
- Bone Scan on

- CT scan of head on [redacted] repeated on [redacted]
- MRI scan of brain on [redacted]
- EMG/NCV testing of the bilateral lower extremities on [redacted]
- MRI scan of lumbar spine on [redacted]
- EMG/NCV testing of the bilateral upper and lower extremities on [redacted]
- Functional Capacity Evaluation (FCE) on [redacted]
- MRI scan of thoracic spine and lumbar spine, both on [redacted]
- EMG/NCV testing of the bilateral lower extremities on [redacted]
- Second opinion examination at the request of the District Office with Dr. [redacted] (Orthopedics) on [redacted]. Dr. [redacted] opined that the accepted sprain has resolved, but her displaced lumbar disk has progressed into degenerative disk disease. Because the claimant's injury residuals were ongoing, Ms. [redacted] was not believed capable of resuming full duty work. However, Dr. [redacted] did feel that she could perform sedentary work with lifting limited to 5 pounds. The recommendation was for an initial return to work for 4 hours per shift, progressing to 8 hrs per shift over the course of the next 6 months.

Weight of medical opinion with respect to Ms. [redacted] ability to work was accorded to Dr. [redacted] based on his [redacted] report. Her case was referred to the District Office's vocational rehabilitation specialist on [redacted] to assist in identifying potential employment opportunities. The instruction given was for the rehabilitation counselor to first identify opportunities with the claimant's former federal employer. Upon receipt of the referral, Ms. [redacted] case was assigned to rehabilitation counselor [redacted].

The VA offered the position of [redacted] to Ms. [redacted] at their location in [redacted]. The date of the job offer is [redacted] revised [redacted] and [redacted].

The Jacksonville District Office found the position suitable. Per outgoing letter from the District Office (dated [redacted]), Ms. [redacted] was advised that the position of [redacted]—offered [redacted]—was suitable. She was advised to report for work within the next 30 days or provide a valid reason for her refusal of it.

Ms. [redacted] did not report for work within the time allotted. Per outgoing letter from the District Office (dated [redacted]), it was noted that Ms. [redacted] had refused the position of [redacted] offered by the [redacted] in [redacted]. Medical records received in response to the District Office's [redacted] job suitability letter were listed. There was also a letter from attorney Paul Felser (dated [redacted]). The second opinion examiner was not believed to have considered the claimant's medical conditions in their totality when commenting on her ability to work. For that reason, the district office's finding of suitability with respect to the [redacted] job was believed to be erroneous.

Mr. Felser also felt that the description of the job offer was not sufficiently specific and that it exceeded Ms. [redacted] work tolerances.

The District Office addressed Mr. Felser's objections over _____ but still found it suitable. Ms. _____ was given another 15 days to report for work or face a sanction decision.

Her refusal of the _____ continued. A vocational rehabilitation report and a completed CA-1032 form were received beyond the date of the _____ letter. The sanction was issued on _____ with a corrected sanction issued on _____

Ms. _____ and Mr. Felser disagree with District Office's _____ sanction decision. Per timely submission dated _____ and received _____ Mr. Felser has requested a hearing on Ms. _____ behalf in appealing the sanction decision. A telephone hearing was held on July 12, 2016. Ms. _____ was not present for the hearing. In her absence, she was represented by attorney Paul Felser.

He was invited to talk about his disagreement with the District Office's decision, citing any evidence not believed to have been given sufficient consideration. Mr. Felser was invited to identify any erroneous action, procedural error or error in logic on the part of the District Office. He was invited to elaborate on any evidence which shows that the job offer was not suitable or that Ms. _____ medically incapable of working the job offered.

Mr. Felser first discussed the second opinion report from Dr. _____ Dr. _____ diagnosed degenerative disk disease which has not been accepted by the District Office.

Mr. Felser made reference to the FCE that Ms. _____ underwent in _____ noting that the test ought to have been more current when referencing it with respect to any return to work. In reviewing the test report, Mr. Felser observed that while the claimant was unable to complete all aspects of the test, the result was valid. The test showed that the claimant was only able to sit for 40 minutes. There was nothing which showed that Ms. _____ condition improved since the FCE test date.

The limited duty job offered to Ms. _____ entailed prolonged sitting. Mr. Felser believes that the sitting required by the _____ exceeds her work tolerances. The job offer lacks any explanation as to how her limited ability to sit would be accommodated in the telephone position offered.

Mr. Felser finds fault with the District Office's vocational rehabilitation efforts in that there was no transferable skills analysis which would give a fair indication as to what Ms. _____ vocational abilities are. Mr. Felser pointed out that the claimant's first language is Spanish; her English-speaking skills and her education are limited. He argues that since the _____ offered to Ms. _____ requires that she be bilingual; her English-speaking abilities are not proficient enough for her to be considered bilingual. Ms. _____ has always spoken to Mr. Felser via conference call where her daughters act as interpreters.

When questioned about the written submissions in Ms. [redacted] record, Mr. Felser explained that she was either assisted by her daughters in their preparation or her daughters prepared them for her submission.

Mr. Felser further argued that the claimant lacks the technical expertise to perform [redacted] duties. He felt that there should've been additional medical and vocational testing performed before determining that the [redacted] job Ms. [redacted] refused was suitable.

At the close of the hearing, it was explained that if the [redacted] decision is to be reversed or remanded there needs to be evidence or argument which establishes that it was erroneous or that further consideration should now be given. The case record was held open for 30 days beyond the date of the hearing to allow for submission of any additional evidence to be considered when a decision was made.

Evidence received beyond the date of the [redacted] hearing consists of the following:

- Letter from Mr. Felser (dated [redacted] in follow-up to the [redacted] which provides a summary of the arguments made on Ms. [redacted] behalf. She relocated from [redacted] to [redacted] so that family could provide assistance with activities of daily living. Second opinion examiner Dr. [redacted] restricted Ms. [redacted] to 2 hrs of sitting per shift. Though there was clarification that Ms. [redacted] 2 hr sitting restriction would be accommodated in the [redacted] position, it was unknown as to how. Mr. Felser also questioned what Dr. [redacted] basis would be for sitting as long as 2 hrs at a time when the FCE (deemed valid) indicated that she could only sit for 40 minutes. Mr. Felser did not feel that Dr. [redacted] report reflected sufficient consideration of Ms. [redacted] medical records or to her non-work related medical conditions. Mr. Felser believes that the description of the job offered to Ms. [redacted] was "generic," lacking specific discussion of the duties to be performed. Additionally, Mr. Felser argues that while Ms. [redacted] date of injury job was that of a [redacted] the position of [redacted] —where use of a [redacted] would be required—is not vocationally suitable. Her limited command of English also renders the [redacted] position vocationally unsuitable. Mr. Felser's memo reflects having reviewed the vocational records in Ms. [redacted] file. The RC (rehab counselor) was asked to identify job opportunities in [redacted] as well as in [redacted] but Mr. Felser found nothing which supports that any such effort was made on part of the RC. The vocational rehabilitation effort was argued to be insufficient. In concluding his submission, Mr. Felser believes that Ms. [redacted] is entitled to a more thorough suitability analysis than given when the sanction decision was issued.
- Statement from [redacted] (dated [redacted] attesting to Ms. [redacted] limited English speaking abilities.

The arguments presented at the July 12, 2016 hearing and the submissions received beyond the hearing are evaluated in light of the evidence previously received. The determination is that the October 16, 2015 sanction from the District Office should be REVERSED.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits. This includes cases in which the Office terminates compensation under section 8106(c)(2) of the Act for refusal to accept suitable work. The Act provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee is not entitled to compensation.¹

Section 8106(c)(2) of the FECA provides that a partially disabled employee who: (1) refuses to seek suitable work; or (2) refuses or neglects to work after suitable work is offered is not entitled to compensation. An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.²

An employee who refuses or neglects to work, after suitable work has been offered or secured for the employee, has the burden of showing that such refusal or failure to work was reasonable or justified and shall be provided with the opportunity to make such a showing before entitlement to compensation is terminated. To justify termination, the Office must show that the work offered was suitable and that claimant was informed of the consequences of her refusal to accept such employment.³

The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by medical evidence.⁴

In 1987 the pertinent regulation applied only to former employees, employees who were terminated from the agency's employment rolls. However, the regulation in effect since 1999 contains no such restrictive language. The regulation now states that the employer "should" offer suitable reemployment where the employee currently resides, if possible. (20 C.F.R. § 10.508 (1999)). This regulation applies to both those employees who are no longer on agency rolls and those employees who continue on the agency rolls.

If an employee moves or relocates, while on agency rolls, from the area in which the employing establishment is located, such a move is an unacceptable reason for refusing to accept an offer of suitable employment.⁵

The Employees' Compensation Appeals Board has held that relocation for personal reasons is insufficient to constitute a reasonable basis for refusal of suitable work.⁶

¹ *Shirley B. Livingston*, 42 ECAB (Docket No. 91-0553, issued August 21, 1991).

² *Edward P. Carroll*, 44 ECAB (Docket No. 91-1323, issued December 29, 1992); *Charlene R. Herrera*, 44 ECAB (Docket No. 92-152, issued January 7, 1993); *Patsy R. Tatum*, 44 ECAB (Docket No. 91-1422, issued February 19, 1993); *Bradley L. Mattern*, 44 ECAB (Docket No. 92-2132, issued July 6, 1993).

³ *Kathy E. Murray*, 55 ECAB (Docket No. 03-1889, issued January 26, 2004).

⁴ *Kathy E. Murray*, 55 ECAB (Docket No. 03-1889, issued January 26, 2004).

⁵ *Edward P. Carroll*, 44 ECAB (Docket No. 91-1323, issued December 29, 1992).

⁶ *J.A.*, Docket No. 07-87 issued February 11, 2008.

In the present case, the [redacted] FCE result the [redacted] second opinion report, and the [redacted] job offer (updated [redacted] and [redacted]) are reviewed in light of the appeal and the arguments made by Mr. Felser.

Per the [redacted] FCE, the claimant was able to sit for 40 minutes, stand for 30 minutes, and walk for 30 minutes. She passed 14/16 validity tests. Ten of 10 functional tests were terminated due to kinesio-physical criteria. Overall, Ms. [redacted] passed 24 of 26 tests associated with the FCE.

The second opinion examiner's [redacted] report does list the multitude of both work and non-work related conditions from which the claimant suffers: diabetes, hypertension, sleep apnea, stroke, obesity, chronic obstructive pulmonary disease, Lupus, arthritis, removal of ½ lung, degenerative disk disease, and displaced lumbar disk. The report is considered comprehensive. The doctor's opinion regarding the claimant's capacity to work does reflect consideration of all of her medical conditions. It reflects having reviewed the submissions in the claimant's case record, her medical history, her use of medications, and the results of a physical examination where strength abilities, range of motion, and reflex abilities were observed. Therefore, Dr. [redacted] opinion regarding the claimant's capacity to work is considered reasonable. Though his opinion that Ms. [redacted] is capable of sitting, walking and standing for 2 hrs/shift is greater than the tolerances identified per the FCE, his assessment is not considered unfair in light of the claimant's conditions. His opinion that the claimant has a 5 pound lifting limit is consistent with the FCE result.

Per VA's the job offer, the tour of duty is from 600am – 1000am. It indicates that suitable employment could not be found at the [redacted]. The physical demands (per the updated job offer) entail operation of [redacted] and the [redacted]. Ms. [redacted] is required to intermittently sit, walk, and stand for up to 2 hrs per shift. An accompanying description of the job's principal duties and responsibilities (forwarded [redacted]) indicates that the [redacted] provides communication services either in English or in Spanish via switchboard or paging system. The physical demands of the job are sitting and standing with a headset provided for moving around the phone station.

The reports from the rehabilitation counselor (RC) are reviewed. Nothing is found where the RC spoke directly with Ms. [redacted] only with her daughter or with [redacted] supervisor at the VA hospital in [redacted]. It was documented that Ms. [redacted] English speaking skills are limited.

Per the [redacted] job offer, the physical demands of the telephone operator position entail sitting in one location while attending [redacted]. Per the "physical demands" sheet, Ms. [redacted] "will spend hours working from a seated position" using [redacted]. A [redacted] will be provided. The "physical demands" sheet also states that the job offer is based on the work tolerances advised by Dr. [redacted]. No prolonged standing or sitting.

The claims examiner handling the case documented a phone call from explaining that the job offer needs to be revised in light of the 2 hr sitting, standing, and walking restriction.

The revised job offer (updated and) is compared with the job offer. The "Physical Demands" sheet states that Ms. is to spend 4 hrs using It again states that the job offer is based on the work tolerances advised by Dr.

Significantly, no difference is found between the duties of the initial job offer and the updated job offer (revised job and). Thus, an explanation as to how the claimant's sitting/standing/walking limitations would be accommodated does seem fair. In the absence of such an explanation, the evidence is not considered sufficient in establishing that the telephone switchboard operator job is medically suited to the claimant's prescribed work tolerances as advised by Dr.

Additionally, the vocational suitability of the job has not been ascertained. The assumption is made that Ms. could be trained to use a along with other equipment. However, the "principal duties and responsibilities" require that communication services be provided either in English or Spanish via computer switchboard. Nothing is found in the case record which supports that Ms. is sufficiently proficient in English to work as a bilingual Since command of a second language is so fundamental to the position offered, verification of her English speaking abilities via vocational testing or other means with the RC would seem crucial in determining whether the offered position is vocational suitable. Given that there's nothing which supports that the RC even spoke with Ms. no such determination can be made.

In summary, the determination is made that the case was not in posture for a sanction decision for having refused a suitable job. The evidence is not sufficient to support that the job offered to Ms. is medically or vocationally suitable. Upon return of the case record to the District Office, Ms. entitlement to compensation should be reinstated retroactive to the date of termination.

The District Office may wish to have Ms. complete a CA-7 form (to be submitted through the VA) which verifies her LWOP (leave without pay) status beginning

If the VA still wishes to offer a permanent, restricted duty position to Ms. the District Office should obtain a new job offer which lists the location, schedule/hrs, duties, physical requirements, and pay rate information associated with it.

The District Office should determine whether there's sufficiently up-to-date medical evidence allowing for a determination as to whether the physical requirements of the position are consistent with any limitations Ms may have. Since the claimant has relocated to

the District Office may wish to find out whether she is still on the agency's rolls when making any suitability determination (see Procedure Manual Section 2.814.5.b).

If a suitable restricted duty job can be offered, Ms. _____ should be provided appropriate notice of its availability, advised of the consequences for refusing it, afforded sufficient opportunity to accept it and, if applicable, allowed opportunity to explain why she is refusing it.

In summary and consistent with the above findings, the decision of the District Office dated October 16, 2015 should be REVERSED. Ms. _____ entitlement to benefits should be reinstated.

Upon return of the file, the District Office should take action as described above.

ISSUED:
WASHINGTON, D.C.
ELECTRONICALLY SIGNED:

Michael S. McCalley
Hearing Representative
for
Director, Office of Workers'
Compensation Programs