

File Number:
HR13-D-H

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U.S. DEPARTMENT OF LABOR

DFELHWC-FECA, PO Box 8311
LONDON, KY 40742-8311
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Date of Injury:
Employee:

Dear

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 preliminary review was completed on the case. Based upon that review, it has been determined that the decision of the Office should be reversed as outlined in the attached decision.

Your case file has been returned to your assigned Claims Examiner. You may contact that office by writing to our Central Mail Room at the following address:

US DEPARTMENT OF LABOR
DFELHWC-FECA, PO Box 8311
LONDON, KY 40742-8311

Sincerely,

Federal Employees Program

PAUL H FELSER ESQ
FELSER LAW FIRM, P.C.
7393 HODGSON MEMORIAL DRIVE
SUITE 102
SAVANNAH, GA 31406

If you have a disability and are in need of communication assistance (such as alternate formats or sign language interpretation), accommodation(s) and/or modification(s), please contact OWCP.

Washington DC, April 06, 2021

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
Claim number

Merit Consideration of the case file was completed on 4/5/21. Based on this review, the decision of the Office dated 2/3/21 is vacated for the reasons set forth below.

The issue for determination is whether the Office properly determined Mr. wage earning capacity by decision dated 2/3/21.

has been employed since 1981 as a Sheet Metal Mechanic by the at On 6/5/06 Mr. filed a claim for right elbow epicondylitis, reporting that repetitive drilling and sanding and riveting caused the condition. Claim was denied by decision dated 7/11/06. In 2013 Mr. filed a claim for bilateral arm and shoulder pain secondary to repetitive drilling and riveting at work. Claim was denied by decision dated 1/13/14.

Mr. suffered a traumatic injury on 2/17/17 while in the performance of his duties; he reported low back pain while bending. A surgery with decompression and fusion was performed on 8/22/17 by surgeon MD. Mr. experienced a normal recovery period. The Office paid wage loss benefits for total disability beginning with the date of the surgery.

While recovering from back surgery, Mr. underwent bilateral Carpal Tunnel releases with Dr. in February 2018.

The Office arranged a second opinion exam to consider whether the back pathology was related to employment and whether the surgery was necessary to treat the condition; on 6/27/18 the patient was seen by board certified orthopedic surgeon MD. Dr. found that the disc herniation was work related and that the surgery appropriate.

On 7/26/18 the Office accepted that Mr. suffered a lumbar disc herniation at L4-5.

Dr. continued the claimant in a non-work status for a year following the back surgery, eventually releasing Mr. to modified work effective 7/30/18. No return to work was affected.

On 11/14/18 hand surgeon MD performed a neuroma excision of the right median nerve with allograft reconstruction. On 1/8/19 Dr. indicated that no work capacity existed until at least 2/19/19. Dr. continued total disability through 5/30/19 following the procedures. Wage loss benefits continued.

The Office sought to understand work capacity following the back surgery, arranging a repeat exam with Dr. _____ on 8/21/19. Active conditions of cervical disc disease, CTS and the lumbar disc pathology were noted. Dr. _____ found that permanent work limitations existed following the surgery. He outlined work tolerances in a form. Bending and stooping were limited to an hour daily, with driving not to exceed 2 hours per day. Pushing, pulling and lifting were limited to 20 pounds, for no more than 3 hours daily. Breaks were required every two hours. Limiting conditions included the CTS, which affected right hand gripping.

A follow up exam at Dr. _____ office was conducted on 8/19/19; no physical exam was recorded in the notes. Dr. _____ provided a release to modified work effective 9/3/19, indicating no lifting over 15 lbs, with the ability to alternate sitting and standing as needed. Avoidance of vibratory tools was also noted.

On 9/12/19 the employer made an offer of modified work, indicating that the claimant would be accommodated in his date of injury position. Mr. _____ did not accept the offered work.

On 9/13/19 attorney Paul Felser noted that his client was in the process of filing a claim for bilateral Carpal Tunnel Syndrome (CTS), adding that any job offer must accommodate all active conditions. He asked that his client be placed on the automated payment rolls as disability had extended for some time.

A claim for bilateral CTS was filed on 10/24/19 by the employer on behalf of Mr. _____. Following development, claim _____ was denied by decision dated 12/10/19.¹

On 10/24/19 the Office forwarded Dr. _____ work tolerances to the employer, soliciting a suitable offer of employment.

On 11/8/19 the employer advised that they would not be able to accommodate Mr. _____ in his usual position. A second letter of 1/23/20 revealed that an extensive search failed to identify a suitable position given the significant restriction and Mr. _____ date of injury duties. The Office placed Mr. _____ on the automated payment rolls in February 2020.

On 6/3/20 the office made a referral for vocational rehabilitation services, seeking employment in the private sector.

On 9/4/20 Mr. _____ was issued a notice of proposed separation based on his inability to perform his duties.

Several clerical position were identified as targets for private sector employment.

On 11/4/20 the employer advised that a temporary light duty position has been identified working on broken or damaged hand tools. The duties of the position were identified. The position was full time, with a start date of 11/16/20. The position was consistent with Dr. _____ restrictions. Mr. _____ accepted the position on 11/13/20.

¹ Following an appeal and a telephonic hearing on 4/8/20, the Branch of Hearings and Review affirmed the denial of 12/10/19.

The Office noted that Mr. [REDACTED] returned to work on 11/16/20, commenting that the position was identified as temporary. The rehabilitation counselor was to seek a permanent assignment consistent with the permanent restrictions assigned by Dr.

Mr. [REDACTED] was moved to the afternoon shift, where a supervisor was available to provide better training and instruction for the new duties.

The claimant's supervisor wrote that Mr. [REDACTED] would be working the second shift, earning a premium pay effective 12/7/20, further increasing his earning. It was confirmed that the position was temporary light duty work.

On 1/20/21 the Claims Examiner acknowledged that Mr. [REDACTED] was working a permanent assignment at the time of injury but the modified work was temporary in nature.

By decision dated 2/3/21 the Office informed Mr. [REDACTED] that his wage loss entitlement was being reduced to zero in accordance with the provision of 5 USC 8106 and 5 USC 8115, as no wage loss was evident based on the actual earnings which exceeded the date of injury pay rate. The office found that the position fairly and reasonably represented Mr. [REDACTED] wage earning capacity. The position was medically suitable and the position was consistent with the type of appointment held on date of injury.

Attorney Paul Felser disagreed with the 2/3/21 decision and requested a telephonic hearing on 3/4/21. No argument or evidence was introduced in support of the appeal.

I find that the case is not in posture for a hearing. Based upon a review of the evidence of record, I find that the Office's decision of 2/3/21 should be reversed.

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.²

The Office must initially determine appellant's medical condition and work restrictions before selecting an appropriate position that reflects his vocational wage-earning capacity. The medical evidence on which the Office relies must provide a detailed description of his condition.³ Additionally, a wage-earning capacity determination must be based on a reasonably current medical evaluation.⁴

There is no evidence that the position Mr. [REDACTED] was provided is not medically or vocationally suitable. The record reflects that he is performing satisfactorily in the assignment, with no performance or attendance issues. The medical record also does not demonstrate that the position is inconsistent with Mr. [REDACTED] work injury or comorbidities, and there is no argument raised by the claimant or his representative that this is the case.

² *Curtis Hall*, 45 ECAB 316 (1994).

³ *Samuel J. Russo*, 28 ECAB 43 (1976).

⁴ *Carl C. Green, Jr.*, 47 ECAB 737, 746 (1996).

Application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.⁵

Reemployment may not be considered representative of the injured employee's Wage Earning Capacity (WEC) when the job is odd-lot, makeshift or sporadic in nature, an injured employee who has been released to full-time work is working less than full-time hours, the job represents permanent seasonal employment in an area where year-round employment is available, the job is temporary where the employee's job when injured was permanent. A job is considered temporary when expressly stated in the job offer, position description, or other supporting documentation.⁶

While it is clear that no loss of wages is currently in evidence, a finding regarding wage earning capacity under 5 USC 8115 must establish that the type of appointment is consistent with the date of injury position. As the Office has established that Mr. _____ was a permanent employee on the date of injury, working a regular, permanent position, a temporary light duty assignment cannot be considered as representative of his true earning capacity.

The decision of 2/3/21 must be vacated. No reinstatement of wage loss benefits is warranted, as under 20 CFR 10.500 the burden is only to establish that the current earnings exceed the current rate of pay for the date of injury position, as detailed in the *Shadrick* decision.

For the reasons set forth above, the decision dated 2/3/21 is hereby reversed, and the case file is **returned** to the Office for actions consistent with this decision.

Issued:

Washington, D.C.

Hearing Representative
for
Director, Office of Workers'
Compensation Programs

⁵ *Albert C. Shadrick*, 5 ECAB 376 (1953); 20 C.F.R. § 10.403(d).

⁶ FECA Procedure Manual Section 2-815-5c(2).