

File Number:  
HR11-D-H

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U.S. DEPARTMENT OF LABOR

OWCP/DFEC, PO BOX 34090  
SAN ANTONIO, TX 78265  
Phone: (202) 693-0045

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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 has been completed, and it has been determined that the case is not in posture for a hearing at this time. The decision of the District Office has been vacated and returned to the district office for further action as explained in the attached Remand Order.

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  
OWCP/DFEC, PO BOX 34090  
SAN ANTONIO, TX 78265

Sincerely,

Division of Federal Employees' Compensation

PAUL H FELSER  
FELSER LAW FIRM  
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, June 24, 2020

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  
Case file number

*Merit consideration of the case file was completed on . Based on the review, the  
decision of the district office dated is set aside and the case remanded to the  
district office for the reasons set forth below.*

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The issue for determination is whether the Office properly denied the claim for wage loss by  
decision dated

was employed as a for the  
He served in the from He was  
first hired by the at a facility in after 2 years he  
transferred to a position in The claimant resigned his position on

On Mr. filed form CA-2, Notice of Occupational Disease, reporting major  
depression, anxiety, suicidal ideation and alcoholism caused by stress due to working  
conditions. He reported that he was unaware of his right to file a claim for injury until  
recently. No factual or medical support for an injury was received.

The Office issued a development letter to the claimant dated advising the claimant  
of the required factual documentation to prevail in his claim for benefits. Medical opinion  
addressing any diagnosis related to the work factors was also requested.

Mr. submitted medical records documenting care for job related stress on  
with a provider. A history of depression was documented at that visit. Treatment records  
document care until No records were demonstrative of care from  
when Mr. sought mental health care again on

Factual responses were provided, documenting position descriptions and performance  
evaluations as well as onboarding paperwork from the High performance reviews were  
indicated when Mr. received a Satisfactory rating. A grievance later  
amended the rating to Fully Successful. In Mr. was placed on a Performance

Improvement Plan (PIP). Additional paperwork documented the transfer to \_\_\_\_\_, as well as some performance related issues.

On \_\_\_\_\_ the Office of Personnel Management approved Mr. \_\_\_\_\_ application for disability retirement.

Mr. \_\_\_\_\_ provided a statements, reporting that his performance ratings were high until \_\_\_\_\_ when his supervisor rated him fully successful. He argued that he was performing the work of 2 people after the resignation of the medical dosimetrists. He argued that he had been given order conflicting with \_\_\_\_\_ practices, as well as given orders from contractors not supervising him. The claimant also complained that in \_\_\_\_\_ he experienced problems with quality assurance relative to a contractor not fulfilling their responsibilities. He noted that he completed his PIP, but argued that this damaged his mental health due to overwhelming stress for an extended period of time. He reported severe depression, anxiety attacks, suicidal ideation and alcohol abuse, as well as migraines, insomnia and gastrointestinal problems. He remained disabled from these conditions, receiving disability retirement and Social Security benefits. He admitted to some mild situational depression while in the service prior to \_\_\_\_\_.<sup>1</sup>

The \_\_\_\_\_ wrote on \_\_\_\_\_ that the claimant first became aware of his condition in \_\_\_\_\_, yet failed to timely file his claim within 3 years of injury. The employer advised that the claimant was upset over contract staff outranking him, but as he was not board certified this was a requirement of the facility. The employer added that Mr. \_\_\_\_\_ was not proficient in all aspects of his position, in spite of his reported 2 years of experience with the \_\_\_\_\_ prior to his transfer. He required assistance and supervision to complete his assigned tasks.

After consideration of the evidence of record, on \_\_\_\_\_ the Office denied the claim, citing a failure to establish a compensable employment factor. The claimant disagreed with this decision and requested a telephonic hearing.

A telephonic hearing was held on \_\_\_\_\_. New evidence was submitted in support of the appeal. The claimant again noted that he performed the work of two people for an extended period of time, while completing his PIP. Paperwork documented a proposed removal for misconduct on \_\_\_\_\_ finalized on \_\_\_\_\_ as well as the subsequent \_\_\_\_\_ settlement agreement arranged with the union, Mr. \_\_\_\_\_ and the employer. The claimant agreed to resign, contingent upon withdrawal of the termination paperwork.

By decision dated \_\_\_\_\_ the Branch of Hearings and Review (BHR) remanded the case to the district office, finding that a compensable factor had been established in the claimant's difficulties in performing the duties as assigned. The PIP and documentation of mistakes were evidence of his inability to be successful in the position. The Office was instructed to secure a second opinion exam from an appropriate physician to consider whether the accepted work factors contributed to or caused an emotional condition.

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<sup>1</sup> Mr. \_\_\_\_\_ was medically discharged due to a cardiac condition.

The Office released a decision on \_\_\_\_\_, indicating that a moderate and recurrent episode of major depressive disorder was accepted as related to the employment factor.

Concurrently, on \_\_\_\_\_ the Office prepared a Statement of Accepted Facts (SOAF) and referred the claimant to a board-certified psychiatrist for examination. Specifically, the provider was to identify all current diagnoses, offering opinion on any type of relationship to the accepted employment factors identified in the SOAF. If any underlying condition was impacted, the provider was to explain whether a temporary or permanent aggravation was in evidence. Work capacity was also to be addressed. If unable to return to work, any modifications required were to be explained. Treatment options were to be addressed.

Mr. \_\_\_\_\_ submitted a claim for wage loss from \_\_\_\_\_ through \_\_\_\_\_

Board certified psychiatrist \_\_\_\_\_, MD saw the patient on \_\_\_\_\_. He noted an accurate history of injury, as well as the distant back sprain in \_\_\_\_\_. He summarized the history since \_\_\_\_\_ and reviewed the position description and SOAF. Onset of symptoms in \_\_\_\_\_ was noted, with a prior episode of depression in \_\_\_\_\_ prior to federal service. Mr. \_\_\_\_\_ had retired from the service due to a heart condition at that time. Constant symptoms were reported in the past 6 years. In \_\_\_\_\_ the claimant was hospitalized for alcohol abuse for 3 months; he was in a recovery group currently. Mental status exam was documented, and diagnoses made of major depressive episode, unspecified anxiety disorder, alcohol abuse by history. Work stressors of performing two jobs caused the current depressive episode. The depression and anxiety were permanent and related to employment. Mr. \_\_\_\_\_ was unable to work in his former capacity due to concentration and memory issues amongst other disabling symptoms. Work restrictions were "not medically warranted at present." The prognosis was guarded

On \_\_\_\_\_ the employer noted that the claimant was working in his full capacities at the time of his voluntary resignation.

The Office subsequently received a copy of a report from board certified psychiatrist \_\_\_\_\_ MD dated \_\_\_\_\_.<sup>2</sup> He opined that the claimant's panic disorder, depression and alcoholism were caused by the inability to perform the full work load assigned at the VA. Dr. \_\_\_\_\_ interviewed the patient on \_\_\_\_\_ and reviewed unspecified records provided to him on \_\_\_\_\_. Dr. \_\_\_\_\_ also indicated that he had reviewed a document he referred to as a Statement of Accepted Facts.<sup>3</sup> It was noted that significant personal stressors occurred after the employment separation, as the claimant's marriage ended in \_\_\_\_\_ due to "inability to work, the alcoholism and domestic disputes". Dr. \_\_\_\_\_ did not specifically address employment capacity.

After consideration of the new evidence of record, on \_\_\_\_\_ the Office denied the claim for wage loss benefits, noting that Mr. \_\_\_\_\_ was not disabled at the time he voluntarily

<sup>2</sup> It appears that this examination was arranged by attorney Felser.

<sup>3</sup> It is unclear what document Dr. \_\_\_\_\_ actually reviewed, as the Office did not create their SOAF until

removed himself from the employment situation. He was therefore ineligible for compensation benefits.

Attorney Paul Felser disagreed with the \_\_\_\_\_ decision and requested a hearing. No new evidence accompanied the appeal request.

I have carefully reviewed all the evidence of record and find that the \_\_\_\_\_ decision should be set aside for the reasons set forth below.

The Employees' Compensation Appeals Board has addressed this same issue in the case of I.B. and the US Post Office, Docket 10-1213, issued 11/23/10. Therein, the District Office had found that appellant did not establish a recurrence of disability as he was terminated for cause. It did not evaluate the medical evidence. The Board noted that termination for cause does not itself give rise to a compensable disability.<sup>4</sup> Appellant would, however, be entitled to wage-loss compensation if he was unable to earn the wages he was receiving at the time of the alleged recurrence of disability due to his employment injury.<sup>5</sup> In similar cases where employment has been terminated for misconduct and disability is subsequently claimed, the Board has noted that the term "disability" means the "incapacity because of injury to earn the wage which the employee was receiving at the time of such injury." Disability benefits are payable regardless of whether the termination of employment was for cause if the medical evidence establishes that appellant was unable to perform his assigned duties due to his injury related condition.<sup>6</sup> The Board found that Office did not evaluate the medical evidence to determine whether he was medically able to perform the duties of his position at the time of his alleged recurrence of disability.

The instant case has a similar scenario. Mr. \_\_\_\_\_ was removed for cause in \_\_\_\_\_. He contested the removal, and was allowed to resign effective \_\_\_\_\_. He has not established that he was unable to continue to perform his usual duties at the time of his resignation. This event does not establish disability. The Office correctly found that the resignation did not create a compensable period of disability. The Office did not further address the medical record subsequent to the negotiated removal. The Office failed to fully address the period of claimed wage loss. Mr. \_\_\_\_\_ claimed roughly 3 and a half years of wage loss, yet the Office only queried the second opinion physician on current work status, and then later cited the resignation as the basis for the wage loss denial. The medical record suggests that at some point subsequent to the resignation Mr. \_\_\_\_\_ became totally disabled from his date of injury position.

If the second opinion specialist submits an opinion which is equivocal, lacks rationale, or fails to address the specified medical issues, the Claims Examiner (CE) should seek clarification or further rationale from that physician. When the OWCP undertakes to develop the evidence by referring the case to an Office-selected physician, it has an obligation to seek

<sup>4</sup> See *John W. Normand*, 39 ECAB 1378 (1988).

<sup>5</sup> See *Janice J. Green*, 49 ECAB 307 (1998).

<sup>6</sup> See *Regina C. Burke*, 43 ECAB 399 (1992) (the Board noted that the Office had erroneously relied upon the case of *Clentino Laspina*, 13 ECAB 201 (1961) as support for the proposition of law that an employee dismissed for misconduct is no longer entitled to monetary compensation regardless of whether accepted employment-related conditions continue to cause a loss of wage-earning capacity).

clarification from its physician upon receiving a report that did not adequately address the issues that the OWCP sought to develop. As such, the CE should seek clarification from the referral physician and request a supplemental report to clarify specifically-noted discrepancies or inadequacies in the initial second opinion report.<sup>7</sup>

I find that the report of \_\_\_\_\_ requires clarification, as the questions posed by the district office did not elicit responses which address the heart of the appeal. The Office posed a question to Dr. \_\_\_\_\_ about work capacity. Dr. \_\_\_\_\_ indicated that Mr. \_\_\_\_\_ was not capable of performing his duties, but he offered a somewhat cryptic response to the request for work tolerances; this should be clarified. While the current status of the patient is required, the unresolved issue before the medical examiner was whether Mr. \_\_\_\_\_ could have continued in his usual capacity after resignation. To that end, the physician should discuss the medical records and opine on when the patient's clinical presentation at any point warranted a change in work status. As total disability was indicated at the time of the exam, Dr. \_\_\_\_\_ should identify the evidence used in establishing when disability began. All opinions should contain medical reasoning.

Upon return of the case file, the district office shall solicit an addendum from Dr. \_\_\_\_\_ as discussed above. Upon receipt of Dr. \_\_\_\_\_ addendum report, and the completion of any additional warranted development, the Office should issue a de novo decision on entitlement to wage loss benefits.

Issued:

WASHINGTON, D.C.

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Hearing Representative  
For  
Director, Office of Workers'  
Compensation Programs

<sup>7</sup> FECA Procedure Manual Section 2-810-9(j).