

File Number:
HR11-D-H

RECEIVED APR 20 2020

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

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
OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 6 JAC
LONDON, KY 40742-8300

Sincerely,

Electronically Signed
Division of Federal Employees' Compensation

PAUL H FELSER
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 17, 2020

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
Case No.

Merit Consideration of the case file was completed in Washington, D.C. Based on this review, the
decision of the Office dated is set aside for the reasons set forth below.

The issue for determination is whether the claimant is entitled to compensation for wage loss
from and continuing.

The claimant, born , is employed by the at
as a medical technologist. She suffered a traumatic injury
on when a broken valve was leaking water on to the floor by a toilet.
This created a pool of standing water on the floor on which the claimant slipped and fell.
She used her right shoulder/arm to try to brace herself. Her claim was accepted for
aggravation of cervical spondylosis and aggravation of brachial neuritis or radiculitis.
Subsequently the accepted conditions were expanded to include right carpal tunnel
syndrome, traumatic arthropathy of both knees and sprain of right shoulder and arm.

On the claimant slipped and fell after using the restroom after a medical
appointment for treatment of her employment injury.

A schedule award was paid to the claimant for 4% impairment of the left arm and 12%
impairment of the right arm.

On the Office received form CA-7 claiming compensation for wage loss
from and continuing. The claim for wage loss compensation was denied
by decision dated It was stated in the decision that the claimant stopped
working on to receive disability retirement benefits. A finding was made that
the claimant was working in a modified job until she abandoned that job on or about
It was noted in the decision that as of she had not
responded to calls from her employer to return to work. Since the claimant elected to
receive disability retirement benefits from the Office of Personnel Management (OPM) the
Office found she was not eligible to receive compensation benefits for wage loss.

I find that the decision is contrary to the Office's procedures.

The Office's Procedure Manual states:

Washington DC, April 17, 2020

" If a claimant returns to work and then stops working and submits a claim for compensation, the CE must make a finding of suitability (as discussed in paragraph 4 of this chapter), unless a formal LWEC decision has been issued.

a. If a formal LWEC determination has been made, the CE must develop the evidence to determine whether modification of that LWEC is appropriate. See PM Chapter 2-1501.

b. If a formal LWEC has not been issued, the CE should evaluate any evidence submitted and the reasons for the work stoppage.

If the evidence of file is insufficient to establish a recurrence (see FECA PM 2-1500), and the CE has determined that the job is suitable (see paragraph 4 and 5 of this chapter), the CE must advise the claimant that the job is suitable and that refusal of the job offer may result in application of the penalty provision of 5 U.S.C. §8106(c), and allow the claimant 30 days to submit his or her response. The claimant should also be advised simultaneously of the evidence necessary to establish a recurrence of disability."¹

No formal loss of wage earning capacity determination has made in this instance. The Office determined that the claimant was not entitled to compensation for wage loss because she stopped working to receive disability retirement benefits from OPM and did not respond to her employer's request that she return to work.

The Office did not make a suitability determination on the modified position and did not advise the claimant that the penalty provision of 5 U.S.C. §8106(c) could be applied.

The development letter dated _____ stated additional evidence was needed to establish disability for work but did not identify the evidence needed to establish disability for work. A statement that pain is a symptom not a diagnosis was included in the letter. While this advises the claimant why pain is insufficient to establish entitlement to compensation it does not advise the claimant of the evidence needed to establish disability for work.

OWCP's implementing regulations define a "recurrence of disability" as an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.² This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury is withdrawn or when the physical requirements of such an assignment are altered such that they exceed the employee's physical limitations.³

When a claimant claims a recurrence of disability due to an accepted employment-related injury, he or she has the burden of establishing by the weight of reliable, probative and substantial evidence that the recurrence of disability is causally related to the original injury.

¹ FECA Procedure Manual 2-814-8

² 20 C.F.R. § 10.5(x)

³ *J.F.*, 58 ECAB 124 (2006)

This burden includes the necessity of furnishing evidence from a qualified physician, who on the basis of a complete and accurate factual and medical history, concludes that the condition is causally related to the employment injury. Moreover, sound medical reasoning must support the physician's conclusion.⁴ An award of compensation may not be based on surmise, conjecture or speculation or on appellant's unsupported belief of causal relation.⁵ The claimant has the burden of providing sufficient evidence, including rationalized medical evidence, to establish the causal relationship asserted.⁶

The Office did not consider whether the claimant's work stoppage was due to a recurrence of disability. The claim for a recurrence of disability was not developed. Receiving OPM disability retirement benefits is not a basis to deny wage loss compensation if a claimant is otherwise eligible for wage loss compensation. While the claimant cannot receive both benefits simultaneously she can elect to receive whichever benefit is more advantageous to her if entitlement to both benefits is established.

The decision dated _____ is vacated. On remand the Office should develop the evidence to ascertain if the claimant's work stoppage was due to a recurrence of disability. A development letter should be sent to the claimant. She should be asked to provide the reasons for her work stoppage and advised of the evidence required to establish a claim for a recurrence of disability. After this and any other development deemed necessary a de novo decision on the claim for compensation for wage loss from _____ and continuing should be issued.

The case is returned to the District Office for the above actions.

Issued:
Washington, D.C.

Electronically Signed
Hearing Representative
for
Director, Office of Workers'
Compensation Programs

⁴ E.M. Docket Number 14-2 (issued June 3, 2014)

⁵ *Rodriguez*, 47 ECAB 437 (1996)

⁶ *Storms*, 52 ECAB 349 (2001)