

File Number:  
HR10-D-H

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U.S. DEPARTMENT OF LABOR

DFELHWC-FECA, PO Box 8311  
LONDON, KY 40742-8311  
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 hearing was held on \_\_\_\_\_ As a result of such hearing, it has been determined that the decision issued by the Office should be vacated and the case remanded to the Office for further action as explained in the enclosed copy of the Hearing Representative's 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  
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, November 12, 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 No. Telephone hearing held on*

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The issue for determination is whether the evidence is sufficient to establish a recurrence of disability causally related to the accepted work injury.

The claimant was employed as a by the  
On she filed a form CA-1, Notice of Traumatic Injury,  
claiming that on she slipped and fell on a wet floor in the restroom at work. The  
Office accepted bilateral traumatic arthropathy, cervical spondylosis without myelopathy, brachial  
neuritis or radiculitis, right carpal tunnel syndrome, and right shoulder sprain as work related. The  
Office authorized anterior cervical discectomy and fusion surgery which was performed on  
M.D.

She had a subsequent injury on when she slipped on a slippery floor, lost her balance  
and hit her head against the wall. The Office assigned case file number and accepted  
lumbar sprain, neck sprain, and head contusion as work related. The Office combined case file  
number with case file number

On she returned to full duty work.

The Office authorized right carpal tunnel release surgery which was performed on  
Following the surgery she returned to full time modified duty on . On  
treating physician M.D. stated that she had reached maximum medical  
improvement and released her to full duty work. The claimant stopped work on .

Or reported that the claimant complained of worsening pain in her neck,  
back, upper and lower extremities. His examination found 5/5 motor strength in the deltoids, biceps,  
triceps, wrist flexion, wrist extension, grip strength, finger abduction and opposition. He noted that  
abduction may be a little weak on the right. He found no intrinsic atrophy and reported good strength  
and sensation in both lower extremities. He found that the cervical spine was fusing solidly without  
complications. He stated that due to the diffuse nature of her symptoms, he could not explain them  
based on the pathology she had present at the time of her surgery.

On the claimant filed form CA-2a claiming increased disability due to her accepted  
conditions.

To determine the nature and extent of disability, the Office referred the claimant for a second opinion examination which was performed on \_\_\_\_\_ by \_\_\_\_\_ M.D. Dr. \_\_\_\_\_ opined that the claimant still had C7 radiculopathy which was limiting range of motion of the neck and right shoulder region and causing some weakness in the hand. He opined that she could not work because she was unable to use her right hand for twisting or unscrewing bottles and jars in the laboratory "according to her own statement." He also stated that "she cannot bend and hold her head down too long due to the restricted range of motion." He provided permanent work restrictions restricting her from reaching above the shoulder, twisting, bending, stooping, operating a motor vehicle at work, squatting, kneeling and climbing. He indicated that she could push, pull and lift up to 10 pounds for up to 4 hours per day.

The Office received a \_\_\_\_\_ memorandum from \_\_\_\_\_ Laboratory Flight Commander, describing the duties of the Medical Technologist position. \_\_\_\_\_ stated that the work requires regular and recurring physical exertion such as prolonged standing, bending over microscopes, reaching for supplies or materials, and rarely lifting heavy items such as supplies (and infrequent lifting of heavier items such as reagent packs). Laboratory work is alternated with desk work daily. The position requires less than an hour per day of simple grasping, such as opening jars/vials with hands; and less than 4 intermittent hours of twisting, stooping, overhead lifting/reaching, carrying, pushing and pulling.

On \_\_\_\_\_ the Office paid schedule award compensation for 4% permanent partial impairment of the left upper extremity and 12% permanent partial impairment of the right upper extremity. The period of the award covered \_\_\_\_\_ through \_\_\_\_\_.

Or \_\_\_\_\_ the claimant filed a form CA-7 claiming compensation for temporary total disability for the period \_\_\_\_\_ and continuing. The employing agency in a \_\_\_\_\_ letter that upon the claimant's release to light duty the agency was not given the chance to offer her a job within her restrictions because she refused to work while waiting for disability retirement to be approved. The claimant elected disability retirement on \_\_\_\_\_.

By decision dated \_\_\_\_\_ the Office denied the claim for compensation for the period \_\_\_\_\_ and continuing for the reason that she was not entitled to receive wage loss compensation after \_\_\_\_\_ because she was receiving disability retirement benefits from the Office of Personnel Management.

The claimant disagreed with the \_\_\_\_\_ decision and requested a hearing by the Branch of Hearings and Review. By decision dated \_\_\_\_\_ the Branch of Hearings and Review determined that the receipt of disability retirement benefits was not a basis to deny wage loss compensation because the claimant could elect to receive benefits from the Federal Employees' Compensation Act (FECA). The decision remanded the case for the Office to develop the reasons for the work stoppage.

By letter dated \_\_\_\_\_ the Office asked the claimant to submit a narrative medical report explaining the basis for the period of renewed disability from work.

By decision dated \_\_\_\_\_ the Office denied compensation for the period \_\_\_\_\_ and continuing for the reason that the medical evidence did not support that the claimant was totally disabled beginning \_\_\_\_\_.

The claimant disagreed with the . decision and requested an oral hearing with an OWCP representative. A telephone hearing was held on ( Paul H. Felser represented the claimant at the proceedings.

At the hearing Mr. Felser noted that Dr. supported that the claimant could not perform her full duty position and the agency could not accommodate her medical restrictions. He referenced the "Agency Certification of Reassignment and Accommodation Efforts" signed by on which reported that the agency could not provide a modified assignment due to the severity of the medical condition and the physical requirements of the position. He further argued that the employing agency did not take into account the claimant's prior conditions.

A copy of the transcript was sent to the employing agency for review and comment. The agency did not offer any comments on the transcript.

The record was held open for thirty days to allow for the submission of additional evidence. The Office received an report from , M.D., a pain medicine specialist. Dr. found that the claimant is unable to sit or stand for periods longer than 15 to 20 minutes at a time, and should be allowed to sit, stand or lie down as needed. He found that she cannot walk more than a block before having to sit, and should avoid any climbing, bending, stooping, reaching overhead, and repetitive use of the upper or lower extremities. He restricted her from lifting anything over 20 pounds. Despite these work restrictions, he opined that the claimant is unable to return to the workplace in any capacity including sedentary because "to send this patient back to work would be a set up for poor performance, low productivity, increased risk of pain exacerbation and reinjury, missed days and eventual job termination."

Based on the hearing testimony and review of the evidence of record, I find that the Office's decision dated should be set aside and remanded for further development.

A recurrence of disability is the inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition, which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment, which caused the illness. The 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 or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force) or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.<sup>1</sup>

The claimant has the burden of proof to establish a recurrence of disability. A person who claims a recurrence of disability has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability, for which he or she claims compensation is causally related to the accepted employment injury.<sup>2</sup> 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.<sup>3</sup> Moreover, the physician's conclusion must be supported by sound medical reasoning.<sup>4</sup>

<sup>1</sup>20 C.F.R. § 10.5(x).

<sup>2</sup>*Kenneth R. Love*, 50 ECAB 193, 199 (1998).

<sup>3</sup>*Ricky S. Storms*, 52 ECAB 349 (2001); see also 20 C.F.R. § 10.104(a)-(b).

<sup>4</sup>*Alfredo Rodriguez*, 47 ECAB 437 (1996); *Louise G. Malloy*, 45 ECAB 613 (1994).

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, it shares responsibility to see that justice is done.<sup>5</sup>

In the present case, counsel argued that the employing agency was unable to accommodate the claimant's work restrictions. Dr. [redacted] opined that the claimant could not work because she was unable to use her right hand for twisting or unscrewing bottles and jars in the laboratory "according to her own statement." It is unclear whether the claimant could instead use her left hand to unscrew bottles and jars and work the full duty job. Dr. [redacted] did not have a detailed statement describing the physical requirements of the full duty position, therefore his opinion on the claimant's work capacity has limited probative value.

On remand, the Office should further develop the medical evidence by referring the claimant for an appropriate Board-certified specialist for a rationalized medical opinion on the issues of: 1) the nature and extent of the work injury, 2) whether, beginning [redacted] the medical evidence supports that the claimant was able to perform the work duties required of her in her position as a Medical Technologist; and 3) whether the claimant currently requires any work restrictions as a result of the work injury. The second opinion physician should be provided with a copy of the [redacted] memorandum describing the physical requirements of the Medical Technologist position. The claimant would have no ongoing entitlement to compensation for wage loss once the medical evidence establishes her ability to perform the date of injury position.<sup>6</sup>

Following the referral to the second opinion physician and any other development that the Office deems necessary for proper adjudication of the case, the Office shall issue a *de novo* decision on the claim for compensation.

Consistent with the above findings, the decision of the Office dated [redacted] is set aside, and the case file is remanded for further action as described above.

Issued:  
Washington, D.C.

Hearing Representative  
Branch of Hearings and Review  
for  
Director, Office of Workers'  
Compensation Programs.

<sup>5</sup> See *Richard E. Simpson*, 55 ECAB 490 (2004).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, Disability Management, Chapter 2-0600.14.b.(2) (September 2010).