

File Number:  
HR12-D-H

RECEIVED APR 24 2020

U.S. DEPARTMENT OF LABOR

OWCP/DFEC  
PO BOX 34090  
SAN ANTONIO, TX 78265  
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 hearing was held on                      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  
OWCP/DFEC  
PO BOX 34090  
SAN ANTONIO, TX 78265

Sincerely,

Division of Federal Employees' Compensation

PAUL H FELSER  
FELSER LAW FIRM PC  
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 21, 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 \_\_\_\_\_, Case No. \_\_\_\_\_

An Oral Hearing was held on \_\_\_\_\_ As a result, the decision of the District Office dated \_\_\_\_\_  
has been reversed, and the case has been remanded for additional actions, for the  
reasons set forth below:

---

The issue for determination is whether the Office met its burden when it terminated the claimant's wage-loss compensation and medical benefits under the current claim.

The claimant is an employee of the \_\_\_\_\_ where she worked as a \_\_\_\_\_. Under the current file, the claim was accepted for a work-related injury on \_\_\_\_\_ when the claimant felt a pull in her left shoulder and neck while loading a ledge with a tray of bulk rate mail. The claim was accepted for left cervical strain and left shoulder strain. The claim was subsequently expanded to accept calcific tendinitis of the left shoulder and sprain of left rotator cuff as work-related medical conditions. The claimant underwent the following approved surgical procedures: C6-7 cervical laminectomy on \_\_\_\_\_ and left shoulder arthroscopy with subacromial bursectomy on \_\_\_\_\_.

The District Office referred the claimant for a directed "second opinion" examination for further assessment of the accepted work injury. The claimant was seen on \_\_\_\_\_ by Dr. \_\_\_\_\_ a Board-certified Orthopedic Surgeon. Prior to the exam, Dr. \_\_\_\_\_ received copies of the medical records, a copy of the Statement of Accepted Facts (SOAF) dated \_\_\_\_\_ and a list of questions to address in his narrative report. In his narrative report dated \_\_\_\_\_ Dr. \_\_\_\_\_ discussed the medical findings and prior medical treatment according to his review of the medical records. He provided his detailed examination findings and made the following diagnoses: neck sprain, cervicgia and sprain of left rotator cuff capsule.

Dr. \_\_\_\_\_ opined there were no medical findings to indicate the left shoulder strain or cervical strain were still present. There were also no findings to support a continued diagnosis of calcific tendonitis of the left shoulder. MRI of the left shoulder without contrast on \_\_\_\_\_ was reported as normal. The claimant had residual symptoms due to cervical disc disease only. Dr. \_\_\_\_\_ opined the claimant was unable to perform the duties of her pre-injury job, but was able to perform modified work according to physical restrictions he provided on a completed form OWCP-5 "Work Capacity Evaluation." Dr. \_\_\_\_\_ advised that the claimant was capable of light and sedentary level work. Reaching above the left shoulder should be limited to 4 hours per day. Pushing, pulling and lifting should be limited to 20 pounds.

On \_\_\_\_\_ the District Office issued a Notice of Proposed Termination advising the claimant of the intention to terminate medical benefits and wage-loss compensation with a finding that the weight of medical evidence should be afforded to Dr. \_\_\_\_\_, the second opinion physician, who opined that the residuals of the work-related injury had ceased, and the claimant was no longer disabled from work as a result of the accepted injury. Work limitations were due

to cervical disc disease only, which had not been accepted as work-related. The claimant was afforded 30 days to provide evidence or argument against the proposed termination of benefits.

On [redacted] the District Office issued a formal decision finalizing termination of the claimant's medical benefits and wage-loss compensation under the current claim with a finding that the weight of medical evidence rested with Dr. [redacted] and supported that the accepted work injury had resolved. Additional prior medical treatment letters and letters from the claimant's attorney were found insufficient to shift the weight of medical evidence away from the unequivocal and well-reasoned opinion of Dr. [redacted], which was based on a complete and accurate history of injury, thorough examination and review of the medical records.

The claimant disagreed with this decision and, through her authorized representative, requested an appeal in the form of an Oral Hearing before the Branch of Hearings and Review. A Hearing was held on [redacted]. The claimant did not appear for the Hearing. The claimant's authorized representative, Attorney Paul Felser, appeared for the Hearing and gave argument on the record on her behalf. There was no employing agency representative present to observe the proceedings.

At the Hearing, Attorney Felser argued that the [redacted] Statement of Accepted Facts (SOAF) that was provided to Dr. [redacted] to use as a basis for his opinion was grossly deficient. There were additional more severe conditions than neck and shoulder strains recognized in the well-documented medical treatment records of over 32 years. These conditions required surgical intervention that was approved by OWCP.

Attorney Felser noted there were several versions of the SOAF in the record, going back many years. The most recent SOAF of [redacted] had become so "watered down" to the extent that it no longer recognized the cervical and shoulder surgeries were approved medical treatment for the accepted injury. He noted that the SOAF properly reflected that those surgical procedures were approved in versions prior to [redacted].

Attorney Felser argued that an insidious addition to the most recent SOAF of [redacted] is the statement that cervical degenerative disc disease was not accepted as work-related. He argued that he could not find any formal adjudication of that issue in the record, yet it was listed in the SOAF as if a denial of that condition had been issued. He added that this statement was contrary to the logical conclusion that the approved laminectomy fusion at C6-7 would certainly have accelerated the degenerative cervical changes 32 years later, directly related to the surgical procedure. Under the FECA, if the approved surgery had contributed to the cervical condition in any way, it would be considered work-related. Furthermore, he added that the allowed conditions of the claim should have been upgraded long ago, as the approved C6-7 laminectomy was clearly not to address a cervical sprain.

Attorney Felser argued it was not clear that the second opinion physician had access to all of the critical medical records showing treatment and evaluation of the accepted injury prior to [redacted], which must be provided to the second opinion examiner according to the *Procedure Manual*. The prior portion of the claim was still paper and had not been imaged at the time of Dr. [redacted] examination. The prior medical evidence was indication of much more than a sprain. Prior second opinion physicians of record recognized in their reports of record that more serious shoulder and cervical injuries had occurred as a result of the work injury, necessitating the noted surgical treatments. Dr. [redacted] a prior second opinion physician, gave an extensive analysis, leading to further diagnostic testing. In an addendum report, he supported approval of cervical laminectomy. On [redacted], Dr. [redacted] reported a 30% permanent

partial impairment to the left upper extremity presumably related to the neck and shoulder issues. Or [redacted] the District Medical Advisor noted the injury to the cervical spine and left shoulder in [redacted] resulted in cervical laminectomy. He explained that trapezius tenderness related to the work injury probably caused disuse adhesive capsulitis and tendon atrophy due to pain and guarding. Therefore, the shoulder problem was a direct result of the injury sustained in [redacted] and the proposed arthroscopic surgery was warranted and causally related to the described work-related event. A letter dated [redacted] from OWCP approved reconstructive ligament surgery that was never performed. Approval of such a surgery was recognition that there were more than sprains and strains. Second opinion reports from Dr. [redacted] in [redacted] and Dr. [redacted] in [redacted] reflected positive clinical objective observations for the left shoulder with pain, discomfort and limitations and an additional diagnosis of rotator cuff tendonitis and impingement.

Attorney Felser argued that the law is clear that a second opinion based upon a deficient SOAF is not lessened probative value and cannot be the basis of a termination decision such as this. Proper procedures were therefore not followed in this case, creating a financial hardship for the claimant. He asked that the record remain open for 30 days following the conclusion of the Hearing, to allow for the submission of additional written evidence for the appeal. The request was granted and the record held open. Copies of the transcript were released to the claimant, her representative and the employer. Their comments were invited.

Attorney Felser provided a written statement dated [redacted] in which he expanded on his arguments for the appeal and his discussion of the supportive evidence. He argued the evidence of record supported that the claimant's work-related injuries were more than the strains that were accepted under the claim and identified in the SOAF. The evidence of record supported that the District Office considered the cervical disc herniation work-related and approved surgery for it. Dr. [redacted] the attending physician, reported additional diagnoses of the left shoulder include intact rotator cuff tear with mild tendinopathy and chronic rotator cuff bursitis. In his note dated [redacted] he reported the claimant had permanent impairment from the shoulder injury and opined that ongoing neck and shoulder symptoms were attributable to the injury and resultant subsequent surgery.

Attorney Felser argued that the report of the second opinion physician, Dr. [redacted] was not based on an accurate factual or medical history. The opinion of Dr. [redacted] was of diminished probative value and cannot be afforded the weight of medical evidence. He based his opinion on a SOAF that was incomplete and inaccurate. The SOAF did not identify the approved C6-7 anterior cervical discectomy on [redacted] as approved by OWCP. Dr. [redacted] also was not provided a complete medical record. According to the *Procedure Manual*, the second opinion physician must be provided with all operative reports, all diagnostic tests and all medical records from any qualified physician authored within three years of the date of the second opinion referral. Dr. [redacted] essentially reiterated and adopted the opinion of his associate, Dr. [redacted] who performed a second opinion examination in [redacted]. It appeared that Dr. [redacted] was provided [redacted] office notes from Dr. [redacted] but Dr. [redacted] offered no discussion of the second opinion report of Dr. [redacted] in [redacted] supporting ongoing residuals and disability due to the accepted work injury. The absence of discussion of Dr. [redacted] report was conspicuous.

As of this date, no response to the transcript has been received from the employing agency.

Based on my careful consideration of the evidence of record at this time, I find the termination decision of [redacted] must be set aside. The Office did not meet its burden when it relied on the opinion of Dr. [redacted] as the weight of medical evidence in this case. Dr. [redacted] opinion

was based on a deficient Statement of Accepted Facts. It is therefore of significantly diminished probative value and cannot represent the weight of medical evidence.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>1</sup> The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, the Office must establish that a claimant no longer has residuals of an employment-related condition, which requires further medical treatment.<sup>2</sup> The Office's burden includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>3</sup>

The weight of medical evidence is determined by its reliability, its probative value, and its convincing quality. The opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion are factors which enter into this evaluation.<sup>4</sup>

In the current case, the Office found the opinion of Dr. [REDACTED] the second opinion physician, constituted the weight of medical evidence, and relied upon his opinion to justify termination of the claimant's medical benefits and wage-loss compensation with a finding that the accepted work injury had resolved.

Attorney Felser argued that the SOAF dated [REDACTED] provided to Dr. [REDACTED] was defective as it failed to advise him that the prior surgical procedures of cervical laminectomy on [REDACTED] and left shoulder arthroscopy on [REDACTED] were approved by OWCP as treatment for the accepted work injury. Additionally, the SOAF improperly identified cervical degenerative disc disease as a condition not accepted as work-related, when no formal finding had been made by OWCP on that issue, and the prior medical records were supportive of expanding the claim to include degenerative disc disease stemming from the approved cervical surgical procedure. Additionally, Attorney Felser argued that the claim should be expanded to include more severe conditions affecting the cervical spine and left shoulder, which necessitated the approved surgical procedures, as identified by the treating physicians and second opinion physicians in the past medical records. Lastly, Attorney Felser questioned whether Dr. [REDACTED] had received a complete medical record for review, noting he did not discuss the prior second opinion report of Dr. [REDACTED] and other pertinent medical records showing residuals of the accepted work injury.

I concur that the SOAF dated [REDACTED] that was provided to Dr. [REDACTED] to use as a basis for his medical opinions was deficient. A critical deficiency of the SOAF was that it failed to identify the claimant's cervical laminectomy on [REDACTED] and left shoulder arthroscopy on [REDACTED] as procedures that were approved by OWCP as treatment for the accepted injury.

Additionally, although the *Procedure Manual* provides that "concurrent medical conditions" may be optionally listed in the SOAF if relevant to the claim, the wording in the current SOAF of April

<sup>1</sup> *Adina D. Blanco*, 39 ECAB \_\_\_\_ (1988)

<sup>2</sup> *Leonard M. Burger*, 51 ECAB 369 (2000).

<sup>3</sup> *Raymond W. Behrens*, 50 ECAB \_\_\_\_ (Docket No. 97-1289, issued January 14, 1999).

<sup>4</sup> *Connie Johns*, 44 ECAB 560 (1993.)

"not accepted as work-related" insinuates a denial of cervical degenerative disc disease when no formal finding of that nature has been made.

The Office provides a physician with a SOAF to assure that the medical specialist's report is based upon a proper factual background.<sup>5</sup> The SOAF must include the date of injury, claimant's age, the job held on the date of injury, the employer, the mechanism of injury and the claimed or accepted conditions.<sup>6</sup> Office procedures further indicate that, when an Office medical adviser, second opinion specialist or referee physician "renders a medical opinion based on a SOAF which is incomplete or inaccurate or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether."<sup>7</sup>

As such, the opinion of Dr. \_\_\_\_\_ was not based on an accurate SOAF or an accurate factual background for the claim. It was therefore of significantly diminished probative value.

It is further noted that Dr. \_\_\_\_\_ provided his medical opinion supporting that the claimant has current disability related to cervical degenerative disc disease. The issue of whether cervical degenerative disc disease is causally related to the accepted work injury or the approved surgical C6-7 laminectomy on of \_\_\_\_\_ is a medical question that can only be addressed by a physician under the FECA. The claimant's representative has argued that the prior medical evidence supports such a causal relationship. Dr. \_\_\_\_\_ assigned current work restrictions due to cervical disc disease, but offered no reasoned opinion addressing whether the accepted work injury or approved surgery contributed in any way to the diagnosis of cervical degenerative disc disease. The claimant's attorney argued that the prior medical records support that the accepted work injury resulted in more than the approved strains and sprains. He argued that the approval of C6-7 laminectomy as treatment for the accepted work injury is proof that OWCP also recognized that there were more severe conditions affecting the claimant, causally related to the accepted work injury.

Upon review of the prior medical evidence of file, I concur with the assessment of the claimant's representative. The approval of C6-7 laminectomy was based upon the medical opinion of Dr. \_\_\_\_\_ a second opinion physician, who opined in his reports of \_\_\_\_\_ and \_\_\_\_\_ that this procedure was medically warranted to treat the work-related injury, which he diagnosed as C6-7 herniated disc based upon an accurate history of injury, his examination of the claimant and review of the diagnostic studies including a cervical myelogram on \_\_\_\_\_. When the Office approved the C6-7 cervical laminectomy, it also should have expanded the claim to include the C6-7 herniated disc that Dr. \_\_\_\_\_ identified, the work-related condition for which this treatment was specifically approved.

The claimant's attorney also argued that it was unclear whether Dr. \_\_\_\_\_ received a complete medical record for review in that he did not discuss much of the relevant medical evidence of record including a second opinion report by Dr. \_\_\_\_\_. I concur with this assessment as well. Dr. \_\_\_\_\_ listed a few medical records in his narrative report, but did not discuss the contents of these reports or the medical findings they revealed in any degree of detail. He did not identify or discuss the above-noted second opinion report of Dr. \_\_\_\_\_ nor the second opinion reports of Dr. \_\_\_\_\_ Dr. \_\_\_\_\_ or Dr. \_\_\_\_\_ which are all of record and provide a detailed

<sup>5</sup> *Helen Casillas*, 46 ECAB 1044 (1995).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statements of Accepted Facts*, Chapter 2.809.12 (June 1995); see also *Darletha Coleman*, 55 ECAB \_\_\_\_ (Docket No. 03-868, issued November 10, 2003).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990).

discussion of the medical findings at the time of their examinations. It is therefore unclear whether he based his opinion on the available medical findings of record.

In sum, Dr. [redacted] provided a brief report without sufficient discussion of the prior relevant medical findings according to the prior reports of record, and it is unclear from his report whether he was provided a sufficient/complete medical record for review. The SOAF provided to Dr. [redacted] was deficient, in that it failed to identify the [redacted] C6-7 cervical laminectomy or [redacted] left shoulder arthroscopy as approved procedures. Additionally, when the C6-7 laminectomy was approved, the claim should have been expanded to include C6-7 herniated disc as an accepted condition. The SOAF also contained language that suggested cervical degenerative disc disease was a denied condition, when no formal finding on that issue has been made.

As Dr. [redacted] his opinion on an inaccurate SOAF and incomplete history of injury. His opinion was therefore of diminished probative value and insufficient to represent the weight of medical evidence. The Office therefore failed to meet its burden to justify termination of the claimant's wage-loss compensation and medical benefits in relying on the opinion of Dr. [redacted] as the weight of medical evidence. As the Office failed to meet its burden of proof to justify termination of the claimant's wage-loss compensation and medical benefits, these must be reinstated retroactively back to the date of termination.

It is further noted that, the Office is not a disinterested arbiter but rather performs the role of adjudicator on the one hand and gatherer of the relevant facts and protector of the compensation fund on the other, a role that imposes an obligation on the Office to see that its administrative processes are impartially and fairly conducted.<sup>8</sup> Although the claimant has the burden of establishing entitlement to compensation, the Office shares responsibility in the development of the evidence.<sup>9</sup> Once the Office starts to procure medical opinion, it must do a complete job.<sup>10</sup> The Office has the responsibility to obtain from its referral physician an evaluation that will resolve the issue involved in the case.<sup>11</sup>

On that basis, I find the District Office must write back to Dr. [redacted] to obtain a supplemental report sufficient to resolve the issue under consideration. First, the Statement of Accepted Facts (SOAF) must be amended as follows:

- Identify the [redacted] C6-7 cervical laminectomy and [redacted] left shoulder arthroscopy as approved procedures for treatment of the work-related injury.
- Identify C6-7 herniated disc as an accepted, work-related medical condition.
- Remove the statement indicating that cervical degenerative disc disease is not accepted as work-related.

The updated SOAF should be provided to Dr. [redacted] for review, to use as a factual background for his medical opinion. Dr. [redacted] should be reminded that he must use the Statement of Accepted Facts (SOAF) as a framework for his medical opinion. He should confirm in his report

<sup>8</sup> *Thomas M. Lee*, 10 ECAB 175 (1958).

<sup>9</sup> *William J. Cantrell*, 34 ECAB 1233 (1983); *Gertrude E. Evans*, 26 ECAB 195 (1974).

<sup>10</sup> *William N. Saathoff*, 8 ECAB 769 (1956).

<sup>11</sup> *Mae Z. Hackett*, 34 ECAB 1421, 1426 (1983); *Richard W. Kinder*, 32 ECAB 863, 866 (1981) (noting that the report of the Office referral physician did not resolve the issue in the case).

that he recognizes the accepted facts of the claim, including the accepted work-related conditions and approved surgeries. Dr. \_\_\_\_\_ should be provided copies of the relevant medical documents for review, including the prior operative reports, second opinion reports, diagnostic testing reports and current treatment records from the attending physicians. Dr. \_\_\_\_\_ should identify the medical records he reviewed and discuss the relevant medical findings from those reports.

Based upon an accurate history of injury, his review of the SOAF and medical records, Dr. \_\_\_\_\_ should explain whether the claimant's current medical condition and disability from work is causally related to the accepted work injury or \_\_\_\_\_ the accepted medical conditions identified in the SOAF, or the approved surgical procedures in the SOAF. Dr. \_\_\_\_\_ should explain whether the accepted work injury or approved surgical procedures in any way contributed to the current diagnosis of cervical degenerative disc disease, or aggravated or accelerated that condition to any degree.

Dr. \_\_\_\_\_ should be reminded that it is not necessary for the employment injury, by itself, to have caused appellant's condition, in order for it to be compensable. It needs only to have contributed to it. Where a person has a preexisting condition which is not disabling but which becomes disabling because of aggravation causally related to the employment, then regardless of the degree of such aggravation, the resulting disability is compensable. It is not necessary to prove a significant contribution of factors of employment to a condition for the purpose of establishing causal relation. If the medical evidence reveals that an employment factor contributes in any way to the employee's condition, such condition would be considered employment related for purposes of compensation under the Act.<sup>12</sup>

Dr. \_\_\_\_\_ should be reminded that his rationalized medical opinion must include a discussion of the nature of the underlying conditions (cervical degenerative disc disease); their natural or traditional course; how the underlying conditions may have been affected by appellant's employment as determined by medical records covering the period of employment; whether such affects, if any, caused material changes in the underlying conditions; or, if no material changes occurred, would the symptoms or changes indicative of a temporary aggravation have subsided or resolved immediately upon appellant's removal from the employment environment and, if not, at what point would such symptoms or changes have resolved; and whether any aggravation of appellant's underlying conditions caused by factors of his or her employment caused disability during or subsequent to appellant's employment.<sup>13</sup>

Dr. \_\_\_\_\_ should explain how he reached his conclusions, with reference to any supportive medical findings and with sufficient medical reasoning. If Dr. \_\_\_\_\_ finds that the claimant's current medical condition or current disability from work is in no way causally related to the accepted work injury or approved surgical procedures, the basis for this opinion should also be fully explained, with reference to any supportive medical findings.

If Dr. \_\_\_\_\_ finds that he must re-examine the claimant to provide a sufficient response, this should be allowed and arranged for by the Office. If Dr. \_\_\_\_\_ is unable or unwilling to provide a sufficiently reasoned opinion properly based on the accepted facts of the claim; the claimant should be referred to a new second opinion physician in the appropriate medical specialty to examine the claimant and offer such an opinion on the matters under consideration.

<sup>12</sup> *Arnold Gustafson*, 41 ECAB \_\_\_\_ (Docket No. 89-0438 issued October 30, 1989).

<sup>13</sup> *Newton Ky Chung*, 39 ECAB \_\_\_\_ (1988).



After any further necessary development of the evidence is concluded, the Office should determine whether the weight of medical evidence warrants a new pre-termination notice; or if the claimant remains entitled to ongoing wage-loss compensation and/or medical benefits under the current claim.

For the reasons set forth above, the decision dated \_\_\_\_\_ is hereby reversed, and the claim is remanded for additional actions consistent with this decision, including retroactive reinstatement of the claimant's wage-loss compensation and medical benefits<sup>14</sup>; and additional development of the medical evidence, as warranted.

Issued:  
Washington, D.C.

Electronically Signed (DSL)  
Hearing Representative  
Branch of Hearings and Review  
for  
Director, Office of Workers'  
Compensation Programs

---

<sup>14</sup> Prior to reinstating the claimant's wage-loss benefits, she should be instructed to submit a CA-7 form to claim compensation from the date of termination to the current date, identifying any wages or benefits received during this period, to avoid any possible overpayment of compensation.