File Number:
HR10-D-H

RECEIVED JUN 26 2017

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 hearing was held on As a result of such hearing, it has been determined that the decision issued by the District Office should be vacated and the case remanded to the district office for further action as explained in the enclosed copy of the Hearing Representative's Decision.

Your case file has been returned to the Dallas 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 16 DAL
LONDON, KY 40742-8300

Sincerely,

Electronically signed

Hearing Representative

PAUL FELSER, ESQ
FELSER LAW FIRM, P.C.
QUEENSBOROUGH BANK BUILDING
7393 HODGSON MEMORIAL DRIVE STE 102
SAVANNAH, GA 31406

If you have a disability (a substantially limiting physical or mental impairment), please contact our office/claims examiner for information about the kinds of help available, such as communication assistance (alternate formats or sign language interpretation), accommodations and modifications.

Washington DC, June 21, 2017

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 number A telephone hearing was held on

The issue for determination is whether the District Office properly denied expansion of the claim to include an emotional condition.

born is employed as a Rural Carrier with the in He filed Form CA-2 for an Occupational Disease claimed to be related to factors of his federal employment. The claim is approved for a lumbar sprain, aggravation of pre-existing lumbar spondylosis with myelopathy, and displacement of lumbar intervertebral disc without myelopathy.[1]

Mr. began treating with M.D. of the Spine Institute of Louisiana. Conservative treatment modalities were prescribed.

A CA-20/20a Attending Physician's Report was completed by family practitioner, M.D. on He diagnosed low back pain and depression. Anti-depressant medication was prescribed. In a separate note of Dr. opined that the claimant's depression had come about secondary to his chronic low back pain. In a follow-up note of he stated that Mr. was treated for depression beginning due to his back pain.

In a report of Dr. stated that the claimant had presented him with paperwork from his primary care doctor within which he was diagnosed with depression.

In a report of , Dr. recommended anterior and posterior fusion at the L4-5 and L5-S1 level with reduction of spondylolisthesis. This request was forwarded to the District Medical Advisor (DMA) for review. In a response of DMA M.D. opined that a second opinion was necessary to address this request.

In accordance with this recommendation, the Office referred Mr. for a second opinion evaluation which took place on with board certified orthopedist

[1] The claimant was noted to have first injured his back in when he was pushing a heavy container and slipped, causing it to roll towards him.

Washington DC, June 21, 2017

M.D. It was his opinion that the requested procedure was not warranted. In his report, he included anxiety and depression under the claimant's past medical history.[2]

Following the second opinion, the Office forwarded the case back to the District Medical Advisor on . A response dated was received from Dr. He recommended an impartial examination.

The Office subsequently declared a conflict in medical opinion between attending physician Dr. and second opinion examiner Dr. Mr. was seen for an impartial exam on with M.D. He opined that the requested surgical procedure was warranted. This report was forwarded to DMA Dr. concurred that the procedure was within the realm of accepted medical practice.

A report dated was received from Dr. He noted that the claimant was being followed for low back syndrome, lumbar sprain, and thoracic/lumbar, spondylosis with myelopathy. He went on to state that Mr. had also developed an emotional condition secondary to his "substantial physical injuries." This was due to his inability to cope with the pain and physical limitations resulting from his work related injuries." He diagnosed neuropathy, depression, insomnia and anxiety.

Based upon the report of Dr. the claimant underwent anterior retroperitoneal exposure of L4-5 and L5-S1 for anterior lumbar interbody fusion. Surgery was performed on May 27, 2014.

Following the surgery, Mr. came under the care of board certified psychiatrist M.D. In a report of he stated that the claimant had no prior psychiatric history. He had been injured on while employed for the postal service. He was pushing a large heavy container into the truck when his foot slipped and the container slid back but he managed to hold it is in place. A few months later he lifted a box of wires which caused the same pain again. The claimant reported worsening depression, irritability and decreasing patience. He also reported worsening concentration and forgetfulness. He cited anxiety attacks and increased crying spells. He stated that he could not drive for too long due to pain. The claimant's stressors were listed as "Severe stress due to family, friends, relationship, educational, economic, occupational, housing, legal and health concerns." Dr. Jyoti diagnosed recurrent severe major depressive disorder, anxiety, and impulse control disorder. The claimant was referred for psychotherapy.

At a follow-up appointment on Dr. indicated that the claimant had an episode of depression a week prior. His concentration was improved with Ritalin and he was sleeping well with Ambien. His anxiety was described as being "Okay." Mr. reiterated that he never felt depressed before the accident. Dr. stated that he was totally disabled and required further medical management, including psychotherapy before maximum medical improvement could be determined.

[2] As indicated previously, the claimant's attending physician began referencing complaints of an emotional condition in The date of injury in the instant case is

The claimant was seen for another second opinion exam on with board certified orthopedist M.D. He documented the history of injury and indicated that Mr. had also developed depression and anxiety problems. It was his opinion that he continued to suffer residuals of the work injury. He remained disabled.

The claimant continued to treat with Dr. for his back complaints and with Dr. for his emotional condition. At an appointment on Dr. indicated that the claimant had reached maximum medical improvement with regard to his back. A Functional Capacity Evaluation was recommended. He also noted that the claimant had anxiety and depression issues.

At a follow-up with Dr. on Mr. reported that his depression was about the same but he was doing better with his memory. He also reported some paranoia. His diagnoses remained major depressive disorder (recurrent episode with psychotic features), anxiety state, and impulse control disorder. He remained disabled.

The Office subsequently received a narrative report dated from Dr. regarding a consequential emotional condition. He noted that the claimant had injured his back while employed with the postal service. At the time of exam, he had thought blocking, forgetfulness and impaired cognition. He was diagnosed with major depressive disorder (recurrent severe), anxiety and impulse control disorder. A cognitive disorder also needed to be ruled out. Dr. noted that the claimant had no prior history of any psychiatric problems prior to the injury.

Mr. advised Dr. that he had been suffering from worsening depression, irritability, decreased patience, worsening concentration and forgetfulness. He complained of being overwhelmed and having anxiety attacks. He was started on Lexapro for depression and Ritalin for cognitive treatment. He was also continued on Ambien for sleeping. Due to a subsequent worsening of his depression, his medication was increased. He was also placed on Cymbalta. Dr. disabled Mr. from work and continued to recommend psychotherapy although this had not been approved. In conclusion, he opined,

> "Based on the foregoing, it is my medical opinion that Mr. is presently suffering from Major Depressive Disorder (Recurrent, Severe), Anxiety Disorder NOS, Impulse Control Disorder and Cognitive Disorder, secondary to his inability to cope with the effects of his work-related physical injuries. Prior to his injury, he was fully functional for his age. Since his injury, the level of his activity and his enjoyment of life have been severely diminished. As indicated, he has experienced great difficulty in dealing with these changes, mentally and emotionally."

Upon receipt of Dr. J report, the Office forwarded the case to the District Medical Advisor for review. A response dated was received from DMA , M.D. It was his opinion that the claimant's diagnosed emotional conditions were unrelated to the instant case. He reviewed the report of Dr. but stated that the file lack detailed psychiatric information to support that Mr. suffered from the diagnoses outlined in Dr. J report. He further stated,

"The report from ... MD (Psychiatrist) does not contain detailed psychiatric information such as a detailed psychiatric history; the specific dates of treatment by Dr. , with the corresponding mental status exam findings at each of the treatment dates along with dates of initiation of treatment with psychotropic medications and dates in which the medications were changed. Additionally, the report does not list what symptoms the claimant was experiencing that met diagnostic criteria for major depressive disorder, recurrent severe, anxiety disorder, not otherwise specified, impulse control disorder, not otherwise specified, and cognitive disorder, not otherwise. Furthermore, although Dr. indicates that the claimant suffers from a cognitive disorder, there are no cognitive assessments provided (i.e., neuropsychological testing, MMSE, or the M0CA) to assess for the presence of such cognitive deficits."

By decision dated the Office denied expansion of the claim to include an emotional condition on the basis that the evidence failed to establish that this was caused, aggravated, accelerated or precipitated by the work injury or effects thereof."

The claimant disagreed with this decision and an oral hearing was requested by his attorney, Paul Felser, Esq. A telephone hearing was held on | Mr. was not in attendance however he was represented by Mr. Felser at the proceeding.

Mr. Felser was explicit in stating that Mr. had no history of any prior emotional conditions. He argued that there is no evidence in file which would support that he had any such problems. He also argued that DMA Dr. whose opinion the Office relied upon in their denial, only reviewed three reports at the time the case was reviewed. Therefore, Mr. Felser argued that the DMA was not supplied with adequate information upon which to render an opinion on causation. He stated that the file is well documented with reports from Dr. Dr. and Dr. , all of which support that Mr. was suffering from and treating for an emotional condition secondary to his back condition.

The record remained open for 30 days in order to afford the claimant the opportunity to submit additional evidence. As required by Office procedures, a copy of the hearing transcript was forwarded to the employing agency to afford them the opportunity to comment on the claimant's testimony. No comments have been received and the time allotted to all parties for the submission of additional evidence has now passed.

Based upon the hearing testimony, together with the written evidence of record, I find that the decision of should be *SET ASIDE and REMANDED.*

Where an employee claims that a condition not accepted or approved by the Office was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.[3]

Under certain circumstances, an injury occurring outside performance of duty may affect the compensability of an already accepted injury. A consequential injury is one which occurs

[3]Jaja K. Asaramo, 55 ECAB (Docket No. 03-1327, issued January 5, 2004).

because of weakness or impairment caused by a work-related injury, and it may affect the same part of the body as the original injury or a different area altogether. The basic rule respecting consequential injuries is that when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributing the second condition.[4] Therefore, the subsequent injury can be compensable if it is the direct and natural result of the compensable primary injury. Where there is no direct relationship between an employment-related injury and a subsequent nonemployment injury, the second injury is an independent, intervening incident and is not compensable.

The instant case was filed for an Occupational Disease claimed to be related to factors of Mr. employment. It is formally approved for a lumbar sprain, aggravation of pre-existing lumbar spondylosis with myelopathy, and displacement of lumbar intervertebral disc without myelopathy.

The claimant has alleged that he developed an emotional condition as a consequence of his accepted physical injuries. However, the Office denied expansion of the claim on on the basis that the medical evidence failed to support that the diagnosed conditions were caused, aggravated, accelerated or precipitated by the work injury or effects thereof.

On review, I find that the decision of the District Office must be set aside as further medical development is required in order to assess whether Mr. developed a consequential emotional condition due to the effects of his work related injury. While the evidence from Dr. is insufficient to establish the claim outright, it does support an uncontroverted inference between the accepted conditions on the claim and the development of the claimant's diagnosed emotional condition.

As explained previously, the first medical documentation in file which mentions the claimant's complaints of anxiety is a CA-20/20a dated from Dr. Mr. continued to complain about anxiety and depression from that point forward. In subsequent notes of and he was said to have depression secondary to his back pain.

In a report Dr. noted that the claimant had a back condition and had also developed an emotional condition secondary to his substantial physical injuries. This was due to his inability to cope with the pain and physical limitations that resulted from the accepted conditions on the claim. Mr. was ultimately referred to psychiatrist Dr. At the time of his initial exam on Dr. , confirmed that he had no history of any prior psychiatric problems. He documented the development of the claimant's back condition and noted that he subsequently began experiencing anxiety, depression, and cognitive issues. Mr. continued to see Dr. on a regular basis from that point forward.

[4]Kathy A. Kelley, 55 ECAB 206 (2004); Carlos A. Marerro, 50 ECAB 170 (1998).

As documented previously, Dr. opined in a narrative report of , that the claimant's condition had developed secondary to his inability to cope with the effects of his work related physical injuries. The DMA, Dr. disagreed with this assessment. The primary basis for his opinion was the fact that the file lacked detailed psychiatric information to support that Mr. suffered from the diagnoses outlined in Dr. report. However, it is important to note that the file contains a large amount of documentation relative to Mr. treatment with Dr. This evidence specifically addresses the claimant's complaints as well as the treatment rendered. It also includes an initial history of injury, a review of systems and a documented exam which describes the claimant's appearance, behavior, speech, mood, affect, thought process, thought content, insight/judgement, consciousness and orientation. At the end of every report, Dr. addresses the medications the claimant is taking as well as the dosage. He also indicates whether there have been any medication changes. At present, the file contains reports dated

, and Based upon the report of Dr. it does not appear that he was supplied with this information at the time the case was referred to him. Therefore, I find that the Office prematurely denied the claim and should have initiated further medical development prior to the issuance of a final decision.

Also, following the hearing Mr. submitted additional evidence in support of his request for expansion of the claim. Specifically, a narrative report dated was received from Dr. within which he continued to state that the claimant's emotional condition developed secondary to his claim. He again noted that he had been treating him since 2014 and he was having difficulty coping with the effects of his physical injuries and the way in which this impacted his life. He opined, "Based on the foregoing, I can say with reasonable medical certainty that Mr. is experiencing depression secondary to his inability to cope with the effects of his work related physical injuries." He had reached maximum medical improvement and remained disabled from work.

The claimant submitted a number of handwritten progress notes relative to his treatment with Dr. throughout 2007. He also submitted a narrative report dated rom Dr. He confirmed that he did not start treating the claimant for back pain, depression, anxiety and insomnia until after an accident at work on . He noted that he had filled out a CA-20/20a showing the date of treatment for depression however he accidently checked the box "no" when asked whether the diagnosed condition was caused or aggravated by an employment activity. He stated that he corrected this. He maintained that the claimant's depression, anxiety and insomnia followed the development of his back condition.

A statement from the claimant was received. He noted that his first physical accident was on The evidence of record also supports incidents on and Additionally, his job with the postal service involved substantial lifting,

bending, twisting, stooping and repetitive movement. He confirmed that he never treated for depression, anxiety or insomnia until after He explained that about 8 to 10 months following the 2006 incident he started suffering from depression.

A letter dated was also received from Mr. Felser. He re-iterated many of the same arguments presented at the hearing and again confirmed that Mr. had no history of any pre-existing emotional problems. He also argued that the Statement of Accepted Facts (SOAF) dated was deficient in that it lacked the following information: a complete medical history, a complete list of the claimant's treating physicians, and a detailed history of his work history following the acceptance of the claim. Additionally, the Office failed to list the accepted conditions on the claim and the fact that the 2014 surgery had been approved by the Office.

I find that Mr. Felser's arguments relative to the Statement of Accepted Facts has merit and the deficiencies should be addressed by the Office upon return of the case file. Of particular importance is the fact that the Office failed to include a list of the accepted conditions on the claim. Additionally, the SOAF indicated that Mr. has pre-existing emotional conditions including anxiety and depression. However, this has not been established by the evidence of record therefore it was erroneous for the Office to include this information as part of the factual framework of the case. To the contrary, Mr. , his attorney and his physicians all confirm that he had no history of any prior emotional conditions. It is the Office's responsibility to provide a complete and proper frame of reference for a physician by preparing a statement of accepted facts.[5]

When the District Medical Adviser, second opinion specialist or referee physician renders a medical opinion based on a Statement of Accepted Facts which is incomplete or inaccurate or does not use the Statement of Accepted Facts as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.[6]

Conclusively, I find that the must be set aside. Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.[7] While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence and has the obligation to see that justice is done.[8]

The Employees' Compensation Appeals Board has consistently found that once an employee has established a *prima facie* case, i.e. when he or she has submitted evidence supporting the essential elements of his or her claim, including evidence of causal relationship, the Office has the responsibility to take the next step, either of notifying the employee what additional evidence is needed to fully establish the claim, or of developing evidence in order to reach a decision on the employee's entitlement to compensation.[9]

[5] Donald E. Ewals, 51 ECAB Docket No. 98-2180 issued April 3, 2000.
[6] Federal (FECA) Procedure Manual. Part 3 -- Medical, Requirements for Medical Reports, Chapter 3.600.3 (October 1990); Willa M. Frazier, 55 ECAB 379 (2004).
[7] See Vanessa Young, 55 ECAB 575 (2004).
[8] See Richard E. Simpson, 55 ECAB 490 (2004).
[9] Linda L. Mendenhal, 41 ECAB 1408, (1990).

In the case of William J. Cantrell[10] the Board opined:

> "If the medical evidence supports the claimant's claim, even though it is insufficient to discharge claimant's burden of proving by the weight of reliable, substantial, and probative evidence that the condition was causally related to the work related injury, it does constitute sufficient evidence in support of claimant's claim to require further development by the Office."

Upon return of the case file, the Office should prepare a new Statement of Accepted Facts in accordance with the requirements set forth in Chapter 2-0809 of the FECA Procedure Manual. In particular, the Office should be sure to include a list of the accepted conditions on the claim as well as the fact that Mr. underwent approved spinal surgery on The Office must also remove any reference to anxiety and depression as pre-existing conditions as this has not been established by the evidence of record. The Office should then refer the claimant for a second opinion examination with a Board Certified specialist for an opinion as to whether he suffered a work-related emotional condition either by direct cause, aggravation, acceleration or precipitation. Along with the referral, the Office must be sure to include all relevant medical records including, but not limited to, Mr. Hudson's treatment with Dr. The Office should supply the accepted definitions of causal relationship as outlined in Chapter 2-0805(2) of the FECA Procedure Manual. If a work related diagnosis is established for an emotional condition, the examiner should address whether aggravation is indicated and if so, whether this is temporary or permanent. If temporary, the examiner should indicate if and when the aggravation is expected to cease. Medical rationale and a discussion of the objective evidence of record must be supplied to support the opinions rendered. Following receipt and review, the Office should take any further development action deemed necessary and issue a *de novo* decision addressing expansion of the claim.

Consistent with the above findings, the decision of the District Office dated is hereby set aside and ***remanded*** for further development. The case file is returned for further processing as noted.

ISSUED:

WASHINGTON, D.C.

Electronically signed

Hearing Representative
for
Director, Office of Workers'
Compensation Programs

[10] William J. Cantrell, 34 ECAB 1233, (1983)