

File Number:
HR13-D-H

RECEIVED DEC 08 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 preliminary review was completed on the case. Based upon that review, 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 San Francisco 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 13 SFC
LONDON, KY 40742-8300

Sincerely,

Electronically signed

Hearing Representative

PAUL H FELSER, ESQ
FELSER LAW FIRM
7393 HODGSON MEMORIAL DRIVE
SUITE 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, December 05, 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

Merit Consideration of the case file was completed on review, the decision of the District Office dated forth below. *Based on this is reversed for the reasons set*

The issue for determination is whether the district office properly denied the claimant's wage loss claims under 20 CFR 10.500(a) based upon his failure to accept a temporary light duty assignment.

borr , is employed as an with the
in He filed Form CA-1 for a timely notice of a
Traumatic Injury claimed to have occurred on On this date, he tripped on
a carpet and fell on his right shoulder and elbow. The claim is formally approved for a right
elbow sprain/strain, right shoulder sprain/strain, and right elbow contusion.

According to the CA-1 the claimant stopped work on the date of injury and began treating
with M.D. of High Desert Orthopedics. An MRI of the right shoulder and
x-rays of the right elbow were performed on this date.

The Office began paying wage loss compensation for total disability effective

On Mr. underwent repair of massive rotator cuff tear of the right
shoulder with subacromial decompression, resection of the undersurface of the clavicle,
bicipital tenosynovectomy and debridement of the partial repair, chondroplasty and
debridement of the humeral head with chondral fracture with synovectomy and debridement
of the degenerative tear of the labrum. A letter was sent on authorizing
repair of shoulder, partial removal collar bone, explore treat shoulder joint and muscle
transfer shoulder/arm. The claimant remained out of work and continued to treat with Dr.
post-operatively.

In order to assess continuing injury related residuals, the Office referred the claimant for a
second opinion evaluation which took place on with board certified

orthopedist _____, M.D. It was his opinion that the claimant's diagnosed conditions had not yet resolved. Specifically, he documented "significant loss of active range of motion of the patient's right shoulder." Additionally there was weakness of the deltoid and shoulder flexions. Relative to the right elbow, there was loss of sensation in the ulnar two fingers of the right hand as well as tenderness over the antecubital area. Dr. _____ completed an OWCP-5c form which outlined temporary physical restrictions. The claimant was permitted to work full-time, limited duty with no reaching above the shoulder and no lifting beyond 20lbs.

On _____ the Office wrote to the employing agency requesting a temporary job offer in line with the restrictions outlined by Dr. _____.

A modified assignment was subsequently offered on _____ for a position as an Automotive Worker Supervisor in the DCB Building Mailroom at the FCC Victorville. The duties involved screening mail and administrative duties assigned by the supervisor, although _____ would not be required to respond to emergencies. He accepted this assignment on _____.

In a message of _____ the agency indicated that their job offer was based upon Dr. _____ restrictions, not the second opinion examiner's. However the Office noted that the modified job was in the mailroom and was accommodated by either set of limitations.

On _____ the Office received a report dated _____ from Dr. _____. In this report he diagnosed villonodular synovitis, bicipital tenosynovitis, shoulder sprain/strain, crush injury of shoulder, crush injury or elbow, contusion of elbow, and elbow/forearm sprain/strain. He opined that all of these conditions were attributable to the injury. He assigned restrictions including no lifting over 5 to 10lbs and no repetitive use of the right arm.

The agency issued another job offer on _____ which was based upon the limitations of the second opinion examiner. However, the position itself was unchanged. The offer was still for an Automotive Worker Supervisor in the DCB mailroom and the claimant was responsible for screening mail and performing administrative duties. He once again accepted this position.

According to a telephone message in file dated _____, the claimant returned to work effective _____. He was last paid for total disability through _____.

On _____ the Office received a report from Dr. _____. He reviewed the report of Dr. _____. He went on to state that the claimant required light duty restrictions as he had not fully recovered from the rotator cuff repair surgery performed in _____. Additional physical therapy was recommended.

¹ According to a message in file from _____ because of a personal issue.

² the agency indicated that the claimant did not report to work

The Office spoke to the claimant on He stated that he had been working in the mailroom however his employer wanted to move him back in to the correctional institution and he was afraid that he would not be able to defend himself in case of an attack from an inmate. He said that on his physician updated his work limitations prohibiting him from working around male inmates. He was told to send in this treatment note. However, the Office explained that his physician would need to explain the reason for the change in work limitations.

On this same date, the Office received a work status note dated , from Dr. He instructed the claimant to avoid lifting over 5 to 10lbs and avoid repetitive use of the right arm. Additionally, he was to avoid any contact with male inmates because he would be unable to defend himself.

On the employing agency issued a temporary modified assignment for an Automotive Worker Supervisor in the UNICOR factory at FCC Victorville. The offer was made in accordance with the limitations outlined by Dr. would be required to assist in duties assigned by his supervisor, although he would not be required to respond to emergencies. The claimant declined to accept this position and stated, "I will be unable to defend myself in case an inmate decides to attack me. Management is being unreasonable and putting me in a dangerous situation." He included a copy of Dr. work status note in support of his refusal.

In a phone call with the agency on they indicated that the mailroom job was no longer available. They did state, however, that they would modify the job offer to include a more detailed description of the job duties and physical requirements of the position. They would send him home in the meantime and re-submit the revised job offer.

A modified job offer was issued on for the Automotive Worker Supervisor position. This included a detailed description of the job duties as well as the physical requirements of the position. The claimant was required to check in and screen inmates entering and exiting the factory (excluding pat searches); plan, schedule and supervise inmate work operations; perform administrative duties as assigned to include review paperwork and complete reports as required on a computer terminal; visual searches of the area; and, any other administrative duties assigned by the supervisor. He would not be required to respond to emergencies though. The claimant declined to accept this position for the same reason as previously stated.

On the Office advised the claimant that if he failed to report to the offered temporary assignment, and failed to demonstrate that the declination was justified, wage loss-compensation would be reduced indefinitely since the light duty assignment had no projected end date. The Office explained that the weight of medical evidence had been afforded to second opinion examiner Dr. His attending physician had been given the opportunity to comment on the content of that report however nothing further was received. Therefore, the employing agency formulated a job offer based upon the restrictions outlined by the second opinion examiner and was notified of this in writing.

In response, a statement dated [redacted] was received from the claimant. He stated that if he were to accept the light duty assignment he would be putting himself and other officers at risk. He questioned how he could defend himself when he was restricted from reaching above the shoulder and lifting over 20lbs.

Narrative reports dated [redacted] were received from Dr. [redacted]. He documented the history of injury and opined that this resulted in villonodular synovitis of the right shoulder, crushing injury of the right shoulder, right bicipital tenosynovitis, crushing injury of right elbow, right elbow contusion, and right elbow/forearm sprain/strain. He requested authorization for physical therapy, a tennis elbow brace, and a pain management referral. He stated, "The patient should on light duty. No lifting over 5 - 10ls. Avoid lifting over 5-10lbs. Avoid repetitive use of the right arm. Patient is to avoid any contact with male inmates. Patient is unable to defend himself."

On [redacted] the Office received a CA-7 forms within which [redacted] claimed compensation for total disability from [redacted] to [redacted] and [redacted] to [redacted]

Another report was received from Dr. [redacted] and while the appointment date is listed as [redacted], it was actually signed by him on [redacted]. He noted that the claimant was experiencing difficulty with any lifting, reaching, grasping, and repetitive movements. This affected him at work and at home. As such, he was unable to work full duty. He explained,

"The physical demands of [redacted] occupational duties include restraining, apprehending and physically controlling inmates in emergency situations, for those reasons he cannot work inside the fence with male inmates as he would be unable to defend himself without hazard to self or others. [redacted] is also required to operate machinery, use heavy tools and use firearms. [redacted] can not have frequent and direct contact with inmates on a daily basis due to the hazard this presents. All staff in the correctional facility, regardless of their occupation are expected to perform law enforcement functions. As a result, the incumbent is regularly subject to physical hazards and dangerous conditions such as assaults and hostage situations. For the aforementioned reasons Mr. Stipe must not work inside the institution fence and should remain in the mailroom away from the male inmates."

Dr. [redacted] went on to state that the claimant required restrictions as of [redacted]. He was to avoid contact with male inmates, avoid repetitive use of the right arm and avoid lifting over 15lbs.

At a follow-up on [redacted] Dr. [redacted] continued to outline the same work limitations. Additionally, he re-iterated that the claimant was unable to defend himself as he had undergone a massive rotator cuff repair.

By decision dated [redacted] the Office denied entitlement to compensation for the period of [redacted] and continuing as evidence contemporaneous with the period claimed on [redacted]

the CA-7 established that I had work restrictions in place, that a light duty work assignment within those restrictions was made available, and he was previously notified in writing that such light duty work was available to him. Specifically, he was advised by notice dated (amended on) that temporary modified work as an Automotive Worker Supervisor was available at the Federal Correctional Complex in

Following the denial, additional reports dated and were received from Dr. , although the content remains unchanged from prior notes.

The Office had also received a request for additional medical treatment however it was determined that a supplemental report was required from Dr. to adequately address whether the requested procedure was medically indicated relative to the work injury. No further consideration could be given until a response was received. By separate correspondence, the Office wrote to Dr. for an addendum report.

In the interim, a statement dated was received from the claimant. He explained that he had reported to work on that date because his arm felt better and he was ready to accept the offered assignment. However, he said that he was sent home by management.

On the Office received an addendum report dated from Dr. He reviewed the reports of Dr. dated

and
It was his opinion that the claimant's villonodular synovitis and bicipital tenosynovitis were not trauma related. He noted that the pre-operative MRI of revealed evidence of bicipital tendinitis with some synovitis. This scan was actually performed on the date of injury. He opined, "These noted findings are not trauma related rather give rise to chronic underlying inflammation of the tendons and structures. Therefore, these conditions in my opinion are not related to the specific incident of ." Additionally, he stated that based upon the mechanism of injury there was no crush injury that would have resulted to the shoulder or elbow from the fall.

Dr. felt that the claimant had received adequate conservative treatment. He recommended that he perform self-directed therapy and exercises however no further physical therapy was indicated. It was felt that he would have some level of permanent residuals though. With regard to the requested surgical procedure, Dr. felt that was not a candidate. He noted that prior physical exams documented varying range of motion readings. Additionally, he had full passive range of motion at the time he had examined the claimant. Therefore, he stated that these findings would not support the development of adhesions from a prior surgery. He felt that surgical intervention would be counter indicated and likely result in increased limitations.

In conclusion, Dr. felt that was unable to work in his date of injury position. He stated,

"The claimant should be assigned to a temporary assignment, however one that does not require inmate contact. The mail room assignment is appropriate. However, the proposed assignment on _____ as an Automotive Worker Supervisor appears to subject him to inmate contact which would put him at risk given his physical limitations."

The Office spoke with the agency on _____ and they stated that they could amend the job offer to eliminate the requirement that the claimant check inmates in and out. However, there still may be inmates present when he walks across the compound or walks across the floor to the office where he would work.

The employing agency subsequently submitted an amended job offer dated _____ within which they crossed out the job duties which involved inmate contact.

The Office wrote to Dr. _____ again on _____ for a supplemental report. He was provided with a copy of the amended _____ job offer for review to assess whether this was in line with _____ limitations.

The claimant disagreed with the decision of _____ and requested an oral hearing. In accordance with this request, I have conducted an initial review of the file and find that the case is not in posture for a hearing at this time.

Based on my review of the file, the decision of the District Office should be *REVERSED* for the reasons outlined below.

20 CFR §10.500(a) provides that: "Benefits are available only while the effects of a work-related condition continue. Compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury... An employee is not entitled to compensation for any wage loss claimed on Form CA-7 to the extent that evidence contemporaneous with the period claimed on the CA-7 establishes that the employee had medical work restrictions in place; that light duty within those restrictions was available; and that the employee was previously notified in writing that such duty was available." As such, any claimant who declines a temporary light duty assignment deemed appropriate by OWCP (or fails to report for work when scheduled) is not entitled to compensation for total wage loss for the duration of the assignment.

The instant case was filed for a Traumatic Injury which occurred on _____). The claim is approved for a right elbow sprain/strain, right shoulder sprain/strain, and right elbow contusion. The issue on appeal is whether the Office properly denied entitlement to wage loss compensation from May 25, 2017 and continuing under the auspices of 20 CFR §10.500.

On review I find that the decision of the District Office must be reversed. As explained above, 20 CFR §10.500(a) provides that an employee is not entitled to compensation for any wage loss claimed on Form CA-7 to the extent that evidence contemporaneous with the period claimed on the CA-7 establishes that the employee had medical work restrictions in place;

that light duty within those restrictions was available; and that the employee was previously notified in writing that such duty was available."

In the instant case, the evidence establishes that there were work restrictions in place however it has not been established that light duty was available within those limitations as of [redacted]. Therefore, it was not appropriate to deny wage loss compensation on this basis. As outlined above, the claimant had been in receipt of wage loss benefits for total disability since [redacted]. He underwent approved right shoulder surgery on [redacted].

In order to assess continuing injury related residuals, he was seen for a second opinion evaluation on [redacted] with Dr. [redacted] who assigned work limitations which involved no reaching above the shoulder and no lifting beyond 20lbs. The agency initially offered a modified job on [redacted] which was reportedly based upon the restrictions of Dr. [redacted]. The offer was reissued on [redacted] based upon the restrictions of Dr. [redacted] although the job itself remained the same. The claimant was to work in the DCB mailroom screening mail and performing administrative duties. It was confirmed that he returned to work effective [redacted].

However, [redacted] subsequently learned that he would be moved from the mailroom back to the correctional facility and he had concerns over his ability to defend himself in the case of an inmate attack. The Office subsequently submitted a note from Dr. [redacted] dated [redacted] within which continued to outline the same restrictions as documented previously. However, he also instructed the claimant to avoid any contact with male inmates because he was unable to defend himself.

The agency subsequently issued a new job offer on [redacted] which noted that the claimant would be moved to the UNICOR factory as an Automotive Worker Supervisor. He declined to accept this position and accurately pointed out that this offer did not include a description of the specific job duties and physical requirements of the position.

In response, the agency issued a new job offer on [redacted]. It was for the same position, however it included a description of the job duties as well as the physical requirements of the position. This has been outlined earlier in this decision. While this offer specifically stated that the claimant would not be required to respond to emergencies, his job would involve direct contact with inmates. It was for this reason that [redacted] refused to accept the position.

Following development on [redacted], the Office ultimately denied entitlement to compensation from [redacted] and continuing on the basis that [redacted] had work restrictions in place, that a light duty work assignment within those restrictions was made available, and he was previously notified in writing that such light duty work was available to him. However, I find this to be in error.

As noted previously, Dr. [redacted] had initially assigned restrictions relative to lifting and repetitive motion of the arm. The claimant subsequently notified him that he would be moved back into an area where inmates would be present at which time his physician updated his restrictions. Specifically, he noted that he would need to avoid male inmates

because he would be unable to defend himself. The Office, however, continued to assign the weight of medical evidence to Dr. [redacted]. They stated that the claimant's physician failed to provide an explanation to support the need for this restriction. However, I find that Dr. [redacted] clearly stated why the claimant could not be around inmates. He specifically stated that he would not be unable to defend himself. Given the nature of the claimant's job and work setting, there is the possibility at any time that an altercation may occur with an inmate. Whether he was required to respond to emergencies or not, risk is present when working directly with inmates. The claimant suffered a work related upper extremity condition for which he underwent authorized surgery. Therefore, it would not be considered unreasonable for his physician to assign restrictions relative to inmate contact. At a minimum, the Office should have asked the second opinion examiner to comment on the Dr. [redacted] restrictions prior to moving forward with the wage loss denial.

In response to the Office's development, additional narrative reports dated [redacted] and [redacted] were received from Dr. [redacted] within which he continued to re-iterate that the claimant avoid lifting 5 -10lbs, avoid repetitive use of the right arm and avoid any contact with male inmates due to the inability to defend himself.

Additionally, another report was received from Dr. [redacted] (signed on [redacted]) within which he provided a more detailed explanation in support the above noted restriction. He explained that the claimant was experiencing difficulty with lifting, reaching, grasping, and repetitive movement due to his upper extremity condition. He specifically stated that he could not have "frequent and direct contact with inmates on a daily basis" due to the hazard this presented. Given the nature of his job, he was subject to physical hazards including assaults and hostage situations. Dr. [redacted] re-iterated that the claimant would not be able to defend himself and should not work inside the institution fence. In their decision, the Office noted that Dr. [redacted] was referring to the duties of the claimant's *date of injury job*. Regardless, he still prohibits the claimant from having direct contact with inmates due to the hazard this presents.

Despite the explanation provided by Dr. [redacted] the Office denied entitlement to compensation by decision dated [redacted] for the period of [redacted] and continuing as evidence contemporaneous with the period claimed on the CA-7 established that [redacted] had work restrictions in place, that a light duty work assignment within those restrictions was made available, and he was previously notified in writing that such light duty work was available to him. Again, I find this to be in error as the Office should have at a minimum initiated additional development to the second opinion examiner asking him to comment on the limitations set forth by Dr. [redacted].

It is important to note, however, that following the denial, the Office did just that. Specifically, a supplemental report was requested from Dr. [redacted]. He was asked to comment on several issues including expansion of the claim as well as the need for additional physical therapy and surgical intervention. He supplied an addendum report and his opinion on these particular issues has been previously documented. He was also asked to review the job offer of [redacted] and comment on the issue of suitability. In response, he stated that the

claimant was unable to work in his date of injury position or the modified assignment. He opined,

“The claimant should be assigned to a temporary assignment, however one that does not require inmate contact. The mail room assignment is appropriate. However, the proposed assignment on _____ as an Automotive Worker Supervisor appears to subject him to inmate contact which would put him at risk given his physical limitations.”

Based upon the above, both the claimant’s attending physician and the second opinion examiner felt that the _____ job offer was inappropriate as it subjected him to inmate contact. This would put him at risk given his physical limitations. Therefore, while the claimant had work restrictions in place, there is no evidence that modified work was available within those limitations. As such, the claimant is entitled to wage loss compensation commencing

It is noted that the employing agency issued an amended job offer on _____ based upon the updated limitations outlined by the second opinion examiner in his _____ supplemental report. Specifically, they crossed out the job duties that involved inmate contact. The Office subsequently initiated development to the second opinion examiner to assess whether the claimant was capable of performing in this position. However, it is important to note that in a telephone message from _____ the agency stated that even though the duties involving inmate contact were removed from the offer, the claimant would still need to walk across the compound and walk across the floor to the Office where he would work. Both of these areas may contain inmates. However, this was not reflected in the job offer. Therefore, the agency should be asked to update the job offer as necessary and Dr. _____ should be asked to address whether this position is acceptable, given the claimant's physical limitations. Upon receipt of a response, the Office should take further action as deemed appropriate.²

Consistent with the above findings, the decision of the District Office dated _____ is **reversed** and the case file is returned for further action as described above.³

ISSUED:

WASHINGTON, D.C.

² In order for a job offer (either temp or perm) to be valid it must contain the following information, per Chapter 2-0814 (4)(a) of FECA Procedure Manual: (a) A description of the duties to be performed;(b)The specific physical requirements of the position and any special demands of the workload or unusual working conditions;(c) The organizational and geographical location of the job;(d) The date on which the job will first be available;(e) The claimant's work schedule (including telework);(f) Pay rate (salary) information; and (g) The date by which a response to the job offer is required.

³ The Office should first review the file to determine whether there were any prohibited dual benefits received or any earnings for which a reduction in compensation would be necessary.

Electronically signed

Hearing Representative
for
Director, Office of Workers'
Compensation Programs