

File Number:  
HR10-D-H

U.S. DEPARTMENT OF LABOR

RECEIVED OCT 30 2017

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 Jacksonville District Office. You may contact that office by writing to our Central Mail Room at the following address:

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

Electronically Signed

Hearing Representative

PAUL H FELSER  
FELSER LAW FIRM, P.C.  
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, October 26, 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 \_\_\_\_\_ in \_\_\_\_\_; Case number \_\_\_\_\_. A Telephone Hearing was held on \_\_\_\_\_.

The issue for determination is whether the claimant sustained in fact an injury causally related to his Federal employment.

The claimant, born on \_\_\_\_\_ is employed by the \_\_\_\_\_ in \_\_\_\_\_ as a \_\_\_\_\_. The claimant filed a CA2 Notice of Occupational Disease Claim on \_\_\_\_\_ claiming that in \_\_\_\_\_ that while working he heard popping in his shoulders and he filed a CA1 Claim which was denied and that on \_\_\_\_\_ he went to a doctor and a surgery request was denied so he had a surgery on \_\_\_\_\_. The claimant stated that he became aware of his condition on \_\_\_\_\_.

It should be noted that under file number \_\_\_\_\_ that on \_\_\_\_\_ that the claimant filed a CA2 Notice of Occupational Disease Claim claiming that he sustained de quervain's tenosynovitis due to using his hand and wrist to lift plates and Styrofoam and serving customers in line and wiping down areas and cleaning. By decision dated \_\_\_\_\_ the Office denied the claim based on the determination that the claimant did not establish that he sustained an injury causally related to the claimed employment factors.

It should also be noted that under file number \_\_\_\_\_ that the claimant filed a CA1 Notice of Traumatic Injury Claim on \_\_\_\_\_ claiming that on \_\_\_\_\_ that he was working in the dish room and took a big full trash can to the back dock to put in the trash bin. By decision dated \_\_\_\_\_ the Office determined that the claimant did not establish that he in fact sustained an injury. The claimant appealed the decision and by reconsideration decision dated \_\_\_\_\_ the Office modified the prior decision and determined that the claimant did not establish that he sustained an injury causally related to his employment. The claimant appealed the decision and by reconsideration decision dated \_\_\_\_\_ the Office denied review of the prior decision.

It should also be noted that under file number \_\_\_\_\_ that the claimant filed a timely CA1 Notice of Traumatic Injury Claim claiming that he placed a 10 gallon pot on a top shelf on \_\_\_\_\_ and felt a popping sound in his neck and pain extended down his right arm with tingling in his fingers. The Office accepted that the claimant sustained other affections of the shoulder region not elsewhere classified, a rotator cuff sprain of the shoulder and upper arm, and a right ulnar nerve lesion.

The claimant underwent a right shoulder arthroscopy with an arch decompression on .

The claimant underwent a right cubital tunnel release with an anterior submuscular transposition of the ulnar nerve on . The claimant underwent a right shoulder arthroscopy and decompression on

The claimant was paid ongoing total disability compensation benefits beginning

By decision dated the Office determined that the food service worker position that the claimant returned to on , fairly and reasonably represented his wage-earning capacity and that his actual earnings met or exceeded his wages.

The claimant was paid ongoing disability compensation benefits beginning

which were terminated by decision dated The Office determined that the medical evidence of record established that the claimant could work in a full duty capacity.

By decision dated the Office determined that the claimant sustained a 10% right arm impairment and schedule award compensation benefits were paid. By decision dated the Office denied the claimant's claim for disability compensation benefits beginning and continuing.

The claimant stopped working on and filed a recurrence claim and claims for disability compensation benefits.

In her report Dr. noted the claimant's history of injuries and surgeries and opined that his injury was "exacerbated" based on MRI findings and that he should be treated surgically and not use his right arm at work. Dr. stated in relevant parts,

"Mr. is a year old male who presented on to my clinic with a long standing history of right shoulder and elbow pain. He stated that he had remote history of right shoulder and elbow injury while on the job while working as a chef at Eisenhower in . He subsequently had a right rotator cuff tear/repair in and right ulnar nerve transposition in for cubital tunnel syndrome. He reports that he went back to his regular duties after his first two initial surgeries, but developed right shoulder pain and elbow pain once again. He returned to the operating room again in for "clean up" procedures for treatment of his right shoulder pain. He has had minimal relief of his shoulder pain with each subsequent surgery. Pain is located anteriorly, worse with overhead motions and lifting objects."

"He returned to the office on to discuss MRI results. Impression of MRI noted postero-superior glenoid labrum tear with associated biceps tendinosis. For work restrictions I recommended no use of the right upper extremity, push/pull, no repetitive movements and to continue until reevaluated after his shoulder arthroscopy. I discussed the symptoms, signs and available diagnostic information-MRI results at

length with the patient. I do believe his right shoulder pain and labrum tear is related to his original injury and is an exacerbation. I recommended that he be scheduled for a right shoulder arthroscopy with extensive debridement and biceps Tenodesis."

By decision dated \_\_\_\_\_ the Office denied the claimant's claim for a recurrence of disability and wage loss beginning \_\_\_\_\_.

A \_\_\_\_\_ statement from \_\_\_\_\_, Human Resources Specialist Injury Compensation Program Administrator stated in pertinent part,

"Since \_\_\_\_\_ returned to duty on \_\_\_\_\_ he did not perform his duties as outlined in the PD. \_\_\_\_\_ stated he cannot perform his regular duties despite the fact that the 2 opinion physician released him to full duty. Despite the fact that the most current physician's letter does not provide any clarification to limitations, management always erred on the conservative side and only listed the lightest duties as the expectations of the job. His duties included

- Stock and restock all hat boxes and hairnet containers for availability
- Stock and restock all utensils (do not carry anything over 10 pounds)
- Stock and restock all plastic utensils and all Styrofoam plates, to-go containers, and cups
- Monitor store room levels to ensure there is sufficient supply on hand at all times
- Keep condiment areas neat and clean
- Monitor the salad bar area to ensure it is wiped down during the meal hours
- Keep all stations at the entrance/exit area stocked with to-go bags and maintain cleanliness for these stations as well
- Inform Cook Supervisor/Cook Lead if food items are running low
- Conduct dining hall satisfaction surveys"

By reconsideration decision dated \_\_\_\_\_ the Office denied modification of the \_\_\_\_\_ decision and by reconsideration decision dated \_\_\_\_\_ the Office denied the claimant's request for reconsideration of the \_\_\_\_\_ decision.

On \_\_\_\_\_ the claimant underwent a right shoulder arthroscopy with extensive debridement, arthroscopy with subacromial decompression, and an arthroscopy with AC joint resection and biceps tenotomy which was not authorized by the Office.

The Office should double the instant case with file numbers \_\_\_\_\_ and \_\_\_\_\_

OWCP procedures provide that cases should be doubled when a new injury is reported for an employee who previously filed an injury claim for the same part of the body or similar condition and further indicates that the cases should be doubled as soon as the need to do

so becomes apparent.<sup>1</sup> OWCP procedures provide for doubling claims when correct adjudication of the issues depends on frequent cross-reference between files.<sup>2</sup>

In the instant claim by letter dated \_\_\_\_\_ the Office requested that the claimant submit additional factual and medical evidence to establish his claim. In a separate letter dated \_\_\_\_\_ the Office requested that the claimant's employing agency comment on his claim.

In her report dated \_\_\_\_\_ which was received in the Office on \_\_\_\_\_ Dr. \_\_\_\_\_ stated in relevant part,

"As you mention, you would like to have the diagnosis codes we have treated Mr. \_\_\_\_\_ for in the Orthopaedic Shoulder clinic: Mr. \_\_\_\_\_ underwent an arthroscopy on \_\_\_\_\_ after failure of conservative treatment. Diagnosis at that time was impingement with biceps involvement and AC joint arthrosis, confirmed at the time of surgery. Diagnosis and ICD 10 codes would be for right shoulder pain, 25.511, biceps tendinitis/tendinitis 75.20, impingement right shoulder, 75.41, AC joint pain, 25.5 19. At the time of surgery, it was required that I do an extensive debridement of subacromial decompression and a biceps tenotomy with resection of his AC joint. The CPT codes for those are, the extensive debridement is 29823, biceps tenotomy is 23405, arthroscopy with subacromial decompression 29826, and arthroscopy with AC joint resection, 29824. It is my impression that all these problems of his right shoulder were due to a pre-existing condition from his work related injury. I did not treat him in the past, however, and therefore, I can only state from the time that I started taking care of him until the present.

His job duties that would lead to these types of problems would be lifting at and above shoulder level repetitively over time. As per his history, he had been treated in the past for injuries at work and when he returned, he could not perform these duties requiring him to do lifting and repetitive motion at and above shoulder level with his right upper extremity."

"I do feel \_\_\_\_\_ shoulder problems that I helped him with is the result of his employment as a chef required his subsequent treatment."

By decision dated \_\_\_\_\_ the Office denied the claimant's claim based on the determination that he did not establish that he in fact sustained an injury because he did not establish what in fact occurred. The decision stated in relevant part,

"Specifically your case is denied because the evidence is not sufficient to establish that the event(s) occurred as you described. The reason for this finding is that our office mailed you a questionnaire on \_\_\_\_\_ and we did not receive a statement

<sup>1</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *File Maintenance and Management*, Chapter 2.400.8(c)(1) (February 2000).

<sup>2</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *File Maintenance and Management*, Chapter 2.400.8(c) (February 2000).

to clarify how this injury occurred. Our office is unable to determine exactly how your injury occurred. There was a prior claim with a date of injury of \_\_\_\_\_ that was previously denied, and your statement was needed to differentiate how you were injured in this case versus the \_\_\_\_\_ case and other prior cases.”

The claimant disagreed with the \_\_\_\_\_ decision and requested an Oral Hearing. A Telephone Hearing was held on \_\_\_\_\_. The claimant did not attend the Hearing but was represented by Paul Felser at the proceedings.

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.

At the Hearing Mr. Felser argued that the claimant's other three cases should be doubled with the instant claim and that the claimant's injury resulted from performing repetitive job duties over time. Mr. Felser argued that in the claimant's other cases that the job duties he performed were accepted and therefore those cases establish the type of repetitive activities the claimant does at work.

It was explained that it has to be very clear on exactly what it is he was claiming caused the injury and what job duties were performed over what time period and what the injury is. It was explained that the claimant did not complete the questionnaire the Office sent him on \_\_\_\_\_ and that he could respond to that questionnaire.

On pages 18 through 20 of the hearing transcript Mr. Felser stated that they were claiming that repetitive physical activities “throughout the course of his employment” caused the claimant's injuries in the instant claim.

Mr. Felser was advised that the medical evidence should provide a diagnosis of a condition which could be related to what the claimant claimed caused his injury. Mr. Felser was also informed that the medical evidence received should provide a rationalized medical opinion supported by examination or objective findings which specifically state how the claimed employment factors caused the claimed injury.

Mr. Felser was advised that the record would be held open for 30 days for the submission of additional evidence for consideration.

To determine whether an employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a “fact of injury” has been established. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.<sup>3</sup> Second, the employee must submit sufficient evidence to establish that the employment incident caused a personal injury.<sup>4</sup>

<sup>3</sup> See *John J. Carlone*, 41 ECAB 354 (1989).

<sup>4</sup> *Id.* For a definition of the term “injury,” see 20 C.F.R. § 10.5(a)(14).

Causal relationship is a medical issue,<sup>5</sup> and the medical evidence required to establish causal relationship, generally, is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established incident or factor of employment. The opinion of the physician must be based on a complete factual and medical background of the claimant,<sup>6</sup> must be one of reasonable medical certainty,<sup>7</sup> and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the established incident or factor of employment.<sup>8</sup>

The evidence of record in all of the claimant's cases has been completely reviewed and considered. In his statement which is not dated but was received in the Office on \_\_\_\_\_ the claimant stated in relevant parts,

"My last date at work was \_\_\_\_\_ finally remove from work completely on \_\_\_\_\_ while seeing my doctor he finally stated that there was no use of my right arm and we would have to perform surgery. So, by \_\_\_\_\_ OWCP and ACS continuously sent my approved paper work to the wrong case number so this kept the doctor's office from approving the surgery at this time. The doctor's office later reached out to OWCP and ACS to see why they could not approve the surgery especially since I had already filed all the necessary paperwork however, the answer from them was that my case was closed. They stated that I had 3 case numbers on my record and two of the three were closed when I contacted them myself, after going through that I knew the surgery has to be done so I charged it to my insurance company since I was having so much trouble getting it approved with OWCP and ACS. Because of the continuous mishap with my case number it took me from \_\_\_\_\_ up until \_\_\_\_\_ to get the surgery done."

"Job Description: As a food service worker, our job was to set up the food service counters and steam tables with hot and cold food, we also had to prepare the food such as fruits, vegetables, and salads to make sure they received the food and service that is supposed to be provided. Lifting and pushing dishes, trays, utensils, washing them, disposing of waste, mopping floors, washings walls in the chillers. These was very repetitive tasks that was conducted daily."

"In my humble opinion what cause the aggravated of my conditions to my body is stated in 1 and 3 of this statement. We knew over time the job that I was performing as a food service worker would put a strain on the already ongoing issues I was having with my shoulders and hands."

<sup>5</sup> *Mary J. Briggs*, 37 ECAB 578 (1986)

<sup>6</sup> *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

<sup>7</sup> *See Morris Scanlon*, 11 ECAB 384-85 (1960).

<sup>8</sup> *See William E. Enright*, 31 ECAB 426, 430 (1980).

"3. As a food service worker, we had to do a lot of lifting of food that could be anywhere between 15 to 20 pounds every 15 to 20 minutes, we had to unload and load the dish washer to make sure that the dishes were cleaned, when it came to preparing fruits and vegetables we had to do a lot of repetitive motions such as cutting, lifting, and being able to do things in a swift motion. As a food service worker, we had to make sure we met the standards."

It is noted that under file number [redacted] that it does not appear that approval for the surgery was requested or that authorization was formally considered by the Office in that case.

It is noted that the claimant appeared to describe the full duties of his food service position and attributed his right shoulder injury in the instant claim to those repetitive physical activities in his recent statement. Ms. [redacted] from the claimant's employing agency stated in her [redacted] statement cited above that the claimant worked in a modified capacity since he returned to work on [redacted] and described the repetitive physical activities required in his employment which he performed from [redacted] until he stopped working on [redacted].

Mr. Felser attributed the claimant's injury in the instant claim at the Hearing to repetitive physical activities required in his employment and the claimant and his agency described the physical activities he performed at work. Therefore it is accepted as factual that the claimant was exposed to the claimed employment factors.

Based on the additional evidence received from Dr. [redacted] case must be **remanded**. The claimant has provided additional medical evidence which opines that his right shoulder condition and [redacted] right shoulder surgery and disability are related to his job duties and "exacerbated" his prior shoulder condition. However Dr. [redacted] did not provide a sufficiently detailed and rationalized medical opinion to establish claim.

The Office may undertake to develop either factual or medical evidence for determination of the claim.<sup>9</sup> It is well established that proceedings under the Act are not adversarial in nature, and while the claimant has the burden to establish entitlement to compensation, the Office shares the responsibility in the development of the evidence.<sup>10</sup> The Office has the obligation to see that justice is done.<sup>11</sup>

Given the absence of any contrary medical evidence, Dr. [redacted] reports, although lacking sufficient rationale, are sufficient to require further development of the record by the Office.<sup>12</sup>

On **remand**, the Office should further develop the medical evidence by referring appellant pertinent medical evidence from his cases and a complete statement of accepted facts to an

<sup>9</sup> 20 C.F. R. § 10.11(b); see also *John J. Carlone*, 41 ECAB 354 (1989).

<sup>10</sup> *Dorothy L. Sidwell*, 36 ECAB 699 (1985).

<sup>11</sup> *William J. Cantrell*, 34 ECAB 1233 (1983).

<sup>12</sup> *Rebel L. Cantrell*, 44 ECAB 660 (1993); *John J. Carlone*, 41 ECAB 354 (1989).



appropriate Board-certified specialist to obtain a rationalized medical opinion on the issue of whether appellant's diagnosed shoulder conditions are causally related, either directly or by precipitation, acceleration or temporary or permanent aggravation, to factors of his federal employment, and, if so, to provide treatment recommendations and discuss if the

right shoulder surgery should be authorized by the Office to treat his work-related injuries and discuss periods of work-related disability and specifically if the claimant's work-related disability began in

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 if the claimant sustained a condition as a result of the accepted employment factors.

For the reasons set forth above, the District Office decision dated \_\_\_\_\_ is hereby set aside and the case file is **remanded** to the District Office for actions consistent with this decision.

Issued:  
Washington, D.C.

Electronically Signed

Hearing Representative  
for  
Director, Office of Workers'  
Compensation Programs