

File Number:
HR11-D-H

RECEIVED JUN 21 2007

U.S. DEPARTMENT OF LABOR

EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 50
LONDON, KY 40742-8300
Phone: (202) 693-0045

JUN 15 2007

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 has been completed, and it has been determined that the case is not in posture for a hearing at this time. The decision of the District Office has been vacated and returned to the district office for further action as explained in the attached Remand Order.

Future correspondence should be addressed to: U.S. Department of Labor, Office of Workers' Compensation Programs:

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

Sincerely,

DEPARTMENT OF AGRICULTURE
FSIS-ALL OTHER FSIS
WCB-BUTLER SQUARE WEST, SUITE 420-C
100 NORTH 6TH STREET
MINNEAPOLIS, MN 55403

PAUL H. FELSER
FELSER LAW FIRM, P.C.
7 EAST CONGRESS ST., SUITE 400
PO BOX 10267
SAVANNAH, GA 31412

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 No.

Merit consideration of the case file was completed in Washington,
D.C. Based on this review, the decision of the District Office
dated _____ has been reversed for the reasons set forth
below.

The issue for determination is whether the Office properly
rescinded acceptance of the claim for left carpal tunnel syndrome.

The claimant, born _____, was employed as a
Compensation Claims Technician since _____ with the _____
in _____

On _____ the claimant timely filed a form CA-1, Notice
of Traumatic Injury, claiming that on _____, she reached
behind her to the right to pull/push in a chair and felt something
pull in her right shoulder. She stated she had immediate pain in
her right shoulder, arm and elbow. The claimant sought initial
medical attention on _____ from Dr. _____

The District Office accepted the claim for a right shoulder
sprain. The Office later upgraded the accepted condition to
include a right rotator cuff tear. Case file _____ was
assigned to this claim.

The District Office authorized the claimant to undergo right
shoulder surgery consisting of open decompression, rotator
internal repair, and distal clavicle resection, which was
performed on _____

The claimant returned to restricted duty, four hours a day, on [redacted]. The claimant's work station was ergonomically adjusted for her and she was given a telephone headset.

The claimant's attending physician, [redacted] M.D., took the claimant back off work on [redacted] and released her to work on [redacted] to work an alternating schedule of two days one week and three days the second week.

By letter dated [redacted], the claimant requested treatment for her cervical condition, as she stated Dr. [redacted] told her the condition was related to her shoulder injury and surgery. In her letter dated [redacted] she indicated she had severe pain as a result of her shoulder surgery with pain in her elbow, forearm, wrist, and hand. She did not indicate whether the pain was to her right or left upper extremity. She requested her claim be expanded, stating she never had problems before her injury.

Dr. [redacted] noted in his [redacted] report that the claimant was experiencing pain from her shoulder radiating down to her hand. Dr. [redacted] noted these symptoms continued in his [redacted] report and opined that based on her on-going symptoms, she would be unable to return to work full-time.

On [redacted] the claimant filed a form CA-2, Notice of Occupational Disease, claiming pain in both elbows, wrists and forearms that she stated was caused from overcompensating for her right arm by using her left arm and by using her left arm in ways it was not used to. She stated she overused the left arm by reaching for files, using the mouse, answering the phone, typing, writing, and filing. The claimant stopped work the date she filed this claim. No separate case was created for this claim and the form was placed in case [redacted].

The employing agency challenged the [redacted] claim, primarily noting that the claimant had only worked minimally since her return from work after surgery.

On [redacted] the District Office referred case [redacted] to the District Medical Advisor (DMA) to obtain an opinion on whether the claimant's bilateral arm, elbow, wrist, hand, cervical, or thoracic pain, were due to the [redacted] work injury. The DMA responded by report dated [redacted] opining that bilateral arm, elbow, wrist, hand, cervical and thoracic pain should not be accepted as related to the work injury. He noted that her current complaints arose after her work injury, and since she had not returned to any significant work [redacted].

since her injury, that it was improbable that they were work related.

On _____, the claimant filed a form CA-2, Notice of Occupational Disease, for a left arm condition which she attributed to the performance of her duties. Case number _____ was assigned to this claim. She again claimed her condition was caused by overuse of the left arm by reaching for files, using the mouse, answering the phone, typing, writing, and filing.

In support of the _____ claim, the claimant provided a report dated _____ from _____, M.D. Dr. _____ noted the claimant complained of bilateral hand pain, left worse than right. She indicated the claimant stated she first noticed this in the summer and then it got worse in _____. Dr. _____ noted the claimant said that after thirty minutes of work, her pain is unbearable. Dr. _____ stated the claimant had no previous injury to these areas, except for her right shoulder injury. She explained the claimant's pain is worse when she is sitting at her desk with her elbows on the armrest of her chair. She noted the claimant has diet controlled diabetes, but has not had diabetic neuropathy complications. Dr. _____ diagnosed bilateral flexor compartment tendinitis, severe on the left and mild on the right, and took the claimant off work.

Dr. _____ referred the claimant to _____, M.D. and to _____ M.D. In Dr. _____ report, he noted the claimant's history and noted that the claimant had seen Dr. Kampa because there was some question that her condition might not be work related. He stated Dr. _____ referred the claimant to him to consult on this issue. Dr. _____ described the claimant's findings and stated there was no evidence of carpal tunnel syndrome. He stated the claimant has left forearm overuse syndrome, a repetitive motion disorder. He stated the claimant clearly had tendinitis and muscle strain in the left forearm. He stated given the claimant's history of right shoulder surgery with the resultant change in her work station to shift the work from her right hand to her left, this was what had contributed to the left arm strain/tendinitis. He opined it was appropriate to conclude that the claimant's repetitive motion disorder was work related.

In Dr. _____ report, he described the claimant's history and noted that since her shoulder surgery, that her work station had been redesigned so she could use her left arm. He stated she subsequently developed problems in both arms,

left worse than right. He noted the claimant had a positive He diagnosed bilateral upper extremity pain and paresthesias. He opined that if the claimant's history were correct, this would be considered work-related. He ordered an EMG. The claimant's EMG study was normal.

On the District Office issued a decision accepting the claim for left carpal tunnel syndrome. This case was not combined with case

On the District Office referred the claimant, along with her medical records for case for a second opinion examination with M.D. on the issues of the nature and extent of the claimant's work-related injury; whether she had any consequential injuries; and her work abilities.

In Dr. report, he described the claimant's history, test results and findings on examination. He opined the claimant's current right shoulder condition represented a permanent aggravation of her pre-existing right shoulder condition. He indicated the claimant has multilevel spondylitic changes of her cervical spine which are pre-existing and were unrelated to her work injury. He stated the claimant was suffering from a recurrence of deQuervain's tenosynovitis of the left wrist. He stated she had previous surgery on this wrist in 1993¹ and the condition was not related to her work injury. He stated the claimant had no pathology to explain the subjective pain of her left forearm, noting she had no muscle weakness or atrophy.

The District Office found that Dr. opinion created a conflict of opinion, although they did not identify who the conflict was with. On , the Office referred the claimant to M.D., board-certified orthopedic surgeon. The rererral memo stated the conflict was in reference to work ability; diagnosed work related conditions; and maximum medical improvement and permanent partial impairment.

Dr. did not give any indication in his report that the claimant was referred to him to resolve a conflict in medical opinion. He described the claimant's history, test results and findings on examination. He indicated the District Office requested he advise what the claimant's medical conditions were and whether they were related to the work incidents or employment factors noted in the Statement of Accepted Facts. He

¹The claimant had right deQuervain's release surgery on September 8, 1993. There is no evidence she had left deQuervain's release surgery.

diagnosed the claimant with work-related right shoulder impingement syndrome, post-decompression and distal clavicle excision; natural progression of cervical spine degenerative disc disease, unrelated to work exposure and work injury; left wrist deQuervain's syndrome, unrelated to work injury; and left elbow posteriolateral strain, unrelated to work exposure or work injury. He explained the claimant's symptoms in her neck and left elbow and left wrist did not come on until several months after her work injury to the right shoulder. He noted she has a past history of de Quervain syndrome in the left wrist for which she was treated.² He noted she also has preexisting cervical spine spondylosis, which accounts for her diffuse upper extremity complaints. He opined she also has an element of pre-existing and ongoing myofascial pain dysfunction, unrelated to her work injury and work exposure, which accounts for some of her upper extremity discomfort at this time. He opined this is not a work-related condition and there is nothing about her right shoulder injury or surgery or recovery from her surgery that led to the onset or aggravation of her neck condition and left upper extremity complaints, and, therefore, her neck and left upper extremity complaints are not directly or indirectly work-related.

On _____, the District Office issued a decision in case _____ denying the claim for left carpal tunnel syndrome, stating that the weight of the medical evidence has been determined to rest with Dr. _____, who found that the claimant did not have any work-related injury to her left upper extremity. The Office denied the claim on the basis that she had not established she sustained an injury as defined by the FECA.

The claimant disagreed with the decision and requested an oral hearing before an OWCP representative. By decision dated _____, the Hearing Representative remanded the claim back to the District Office, finding the Office did not meet its burden of proof to rescind acceptance of the claim for left carpal tunnel syndrome. The Hearing Representative also noted the Office did not properly notify the claimant of the grounds for rescinding the claim.

By decision dated _____ the District Office advised the claimant that the acceptance of the left upper extremity injury was rescinded for the reason that she had claimed the condition as a consequential injury on case _____ and the left arm upper extremity condition was not found to be work related based on Dr. _____ opinion.

²There is no evidence the claimant had prior treatment for left deQuervain's, the treatment was only for the right wrist.

The claimant disagreed with the decision and requested an oral hearing before an OWCP representative. I find that this case is not in posture for a hearing. Based on my review of the file, the decision of the District Office dated _____ should be reversed. I do not find that the Office has met its burden of proof in rescinding the prior acceptance of the claim.

Once the Office accepts a claim, it has the burden of justifying the termination or modification of compensation benefits. This holds true where, as here, the Office later decides that it erroneously accepted a claim. To satisfy its burden, the Office must establish that its prior acceptance was erroneous based on new evidence, legal arguments or rationale.³

The act of reopening and rescinding the prior acceptance of a claim, based on an erroneous acceptance, should not be allowed to become a surreptitious route for the Office to readjudicate a case because one set of reviewing Office officials was more liberal or conservative or followed a different policy or philosophy in its interpretation of the law based on identical evidence. In the opinion of the Board, in order for the Office to reopen and rescind its prior acceptance of a claim, it must establish that its prior acceptance was erroneous through new or different evidence and that it is not merely second guessing the initial set of adjudicating officials.⁴

Compensation benefits constitute a property interest that are protected by the due process clause. The Supreme Court has held that the essential requirements of due process are "notice and opportunity to be heard." These essential due process principles require that an employee have "at least notice and an opportunity to respond in some manner" before termination of compensation benefits. As a compensation reduction ends or terminates the payment of a portion of compensation, the same due process principles apply as in a termination case.⁵

Despite the fact that the Hearing Representative had provided the reference for the need to issue a pre-termination notice prior to a decision to rescind benefits, the District Office failed to issue a pre-termination notice.⁶ The claimant was

³Frederick C. Smith, 48 ECAB (Docket No. William T. Abernathy, 48 ECAB (Docket No.

issued October 11, 1996);
issued September 24, 1997).

⁴Daniel E. Phillips, 40 ECAB 1989 [

issued July 25].

⁵Felix Voyles, 46 ECAB (Docket No.

issued July 20, 1995).

⁶Procedure Manual, Chapter 2-1400-6(b).

deprived of due process. Reversal is warranted based on this fact alone.

Further, I do not find that Dr. [redacted] opinion can carry the weight of the medical evidence as his opinion was not based on an accurate history or the factors surrounding the claim on case [redacted] but his opinion was specific to the claimant's work injury, case number 102032819 only. None of the Statement of Accepted Facts (SOAF) in case file [redacted] (dated [redacted] and [redacted]), described the [redacted] claim for a left upper extremity condition. There is no evidence that the District Office provided Dr. [redacted] the claimant's medical records from case [redacted] or that Dr. [redacted] received a complete copy of case file [redacted]. The Office did not ask Dr. [redacted] or Dr. [redacted] to specifically comment on the claim of overuse with the left arm after she had returned to work after surgery and these physicians did not discuss these work factors. While Dr. [redacted] opined the claimant had recurrent left wrist de Quervain's tenosynovitis that was unrelated to her [redacted] work injury because it was pre-existing and did not arise until after her surgery, I find this opinion also lacks probative value for the reason that there is no evidence in the medical records of either case [redacted] or [redacted] that the claimant was diagnosed or treated for left deQuervain's tenosynovitis. The medical evidence only supports she had been treated for the right deQuervain's tenosynovitis.

Further, chapter 2-0809-13⁷ states that medical treatment received may be included in the SOAF but not the recitation of medical opinions or findings. In the present case, it is clear from the SOAF that the Claims Examiner included findings on examination from Dr. [redacted]. I do not find that this was appropriate for incorporation into the SOAF and is not consistent with the information contained in Chapter 2-0809-13. Therefore, I find that the SOAF was inadequate to be used as a framework of reference for Drs. [redacted].

In addition, the case file contains four SOAFs and it is unclear from the record which SOAF was submitted to Dr. [redacted] or Dr. [redacted]. Chapter 2-0809-9 states that "When a second statement is prepared, the Claims Examiner should clearly show whether it replaces or amends the first one. The Examiner should also note on any previous SOAFs that they are superseded, and initial and date the notation." This was not done in the present case.

⁷FECA Procedure Manual.

There is no evidence that the District Office undertook any initial or secondary development regarding the causal relationship of the claimant's left upper extremity condition before the claim was accepted for left carpal tunnel syndrome or when acceptance of the claim was later rescinded. Not only do I find that the weight of medical evidence cannot rest with Dr. [redacted] but I do not find the basis of the [redacted] decision that the claimant did not have a left upper extremity condition because she had previously claimed it as a consequential injury of her right shoulder injury to contain any validity. A close examination of case [redacted] reveals she claimed the same work factors as she did on case [redacted], that is, when she returned to work after her right shoulder surgery, her work station was changed so she could use her left arm. The work factors she claimed under both cases are clearly new and not consequential. She is therefore entitled to development of this claim.

In a similar case that was based on the inaccurate statement of accepted facts, inaccurate factual background presented to the physician, and wrong period of disability to be adjudicated, the Board found that the improperly obtained medical report from the impartial specialist could not be used by the Office to create a conflict with the medical evidence submitted by appellant.⁸

The Office has established procedures for preparation of a statement of accepted facts which include, among others, a statement of the conditions accepted by the Office as employment related.⁹

Since the SOAF is deficient, I cannot find either Dr. [redacted] or Dr. [redacted] opinions can be utilized to determine whether the claimant's left upper extremity condition is causally related to the work factors she claimed in case [redacted]. Therefore, I do not find that Dr. [redacted] report constitutes the new evidence necessary for the District Office to rescind its acceptance of the claim.

The weight of medical evidence is determined by 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 opinion.¹⁰

⁸Myrtle C. Pittman, 40 ECAB (1989) [87-528 May 8].

⁹Lilliana M. Martinez, 42 ECAB (Docket No. [redacted], issued March 20, 1991).

¹⁰Anna C. Leanza, 48 ECAB (Docket No. [redacted], issued October 1, 1996).

While the reports of the appellant's attending physician were not completely rationalized, they were consistent in indicating that appellant sustained an injury or disability due to the employment and were not contradicted by any substantial medical or factual evidence of record. Therefore, while the reports were not entirely sufficient to meet appellant's burden of proof to establish the claim, they raised an uncontroverted inference between the claimed injury or disability and the accepted employment injuries, and were sufficient to require the Office to further develop the evidence.¹¹

While none of the physicians of record in either case or ever diagnosed the claimant with left carpal tunnel syndrome, both Dr. and Dr. agreed the claimant had de Quervain's tenosynovitis of the left wrist. I find that Dr. Burnell and Dr. have presented a *prima facie*¹² opinion on the causal relationship of the diagnosed left wrist condition which requires further medical development. Both Dr. and Dr. opined the claimant does have a left upper extremity condition due to overuse since her return to work after her right shoulder surgery.

Upon return of the case file, the Office should double cases and The Office should prepare a new SOAF to supersede the previous SOAFs¹³ and refer the claimant for a second opinion examination with an appropriate specialist for an opinion regarding whether the claimed work factors contributed by direct cause, aggravation, precipitation or acceleration to the claimant's left elbow, forearm, wrist and hand condition. The SOAF should include a description of the claimant's federal employment duties before and after her return to work. The Office should provide the specialist with the definitions of the types of causal relationship.¹⁴

Due to factors described above, I find that the District Office failed to meet its burden of proof to terminate and rescind the claimant's compensation benefits under case . Upon return of the file, the Office should reinstate benefits retroactive to the date of termination.

¹¹Richard E. Konnen, 47 ECAB (Docket No. , issued February 16, 1996).

¹²A *prima facie* claim is one that on first appearance demonstrates entitlement to compensation and which always requires further development if it is not accepted. Robert P. Bourgeois, 45 ECAB (Docket No. issued July 1, 1994).

¹³Part-2-0809 of the FECA Procedure Manual.

¹⁴Part 2 0805 2 of the FECA Procedure Manual.

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.

JUN 15 2007

DATED:
WASHINGTON, D.C.

Hearing Representative
For
Director, Office of Workers'
Compensation Programs