

File Number:
HR10-D-H

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

MAY 26 2006

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.

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,

Hearing Representative

DEPARTMENT OF THE AIR FORCE
96 MSS/DPC
AFMC PRODUCT CENTERS-SYSTEMS
310 W VAN MATRE AVENUE, SUITE 134
EGLIN AIR FORCE BASE, FL 32542

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P.O. Box 10267
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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 No. Oral hearing was conducted on

The issue for determination is whether the Office properly reduced the claimant's compensation benefits based on a finding that the claimant was capable of performing the duties of a Substitute Teacher.

The claimant, born , was employed as a for the when he injured his neck on during an office move. The Office accepted the claim for cervical sprain and intervertebral cervical disc disorder. Cervical fusion and discectomy surgery was authorized and also accepted. Compensation benefits for temporary total disability were paid.

On the attending physician, Dr. , released the claimant to return to work with restrictions. To assist the claimant with his return to gainful employment, a vocational rehabilitation counselor (RC) was assigned to the claimant on . As part of this effort, the Office authorized training for a mathematics teaching position. Despite the rehab assistance, the claimant did not secure a position as substitute teacher.

On Dr. , the claimant's new attending physician, was asked to provide an opinion on the claimant's ability to work. On Dr. reported that he agreed with Dr. assessment and restrictions.

On the Office issued a decision proposing to reduce the claimant's compensation benefits as the evidence established that he had the ability to earn wages as a substitute teacher. The claimant protested the Office's

proposed decision in his response of In support of his arguments, he claimant provided duplicate copies of medical documentation previously submitted and a letter from his congressional representative. In his report of Dr. indicated that he had been treating the claimant, as of , for work-related chronic neck pain and degenerative disc disease. Dr. also noted that he had reviewed Dr. report of and was in complete agreement with the opinion.

After review of the evidence, the Office issued a final decision on The Office determined that the additional information was insufficient to alter the previously proposed determination. The claimant's compensation benefits were reduced as of

The claimant disagreed with the decision and on through his attorney, requested an oral hearing before a representative of the Office of Workers' Compensation Programs (OWCP).

An updated functional capacity evaluation dated was associated with the case file after the final decision was issued. The evaluator reported that the claimant demonstrated a work tolerance level of sedentary. The evaluator noted that the claimant's self-perception of his functional abilities was sub-sedentary, "significantly below his demonstrated functional ability". The evaluator concluded that this finding was indicative of self-limiting behavior and symptom magnification. The evaluator provided the following restrictions: no continuous sitting or upright postures for more than 1 hour, occasional upright standing and walking, no repetitive or sustained bending and squatting, infrequent stair climbing, crouching, and crawling/kneeling, no repetitive lifting of more than 10 pounds, no forceful pushing or pulling, and no carrying anything for more than 25 feet. The evaluator concluded that the claimant's perception of his pain and functional abilities would inhibit his successful return to work.

Other medical evidence submitted included documentation of the claimant's impairment in support of his request for a schedule award.

On the day of the hearing, the claimant appeared with his attorney, Paul Felser. The attorney argued that the Office did not meet their burden of proof as there

¹ This report dealt largely with the claimant's permanent impairment. Dr. concluded there was no impairment as the only abnormality was a nonanatomical hypoesthesia of the left arm. Dr. noted that he was aware that FECA did not recognize impairments of the cervical spine.

was no basis for the reduction as the Office relied on a FCE from [redacted] that was not current. The attorney maintained that the claimant's medical condition had not been fully developed and he argued that the hand-written statement from the attending physician was not sufficient as a basis for the reduction. The attorney argued that the Office should have relied on the [redacted] medical report from Dr. [redacted] that indicated that the claimant was not able to work and was on disability retirement. The attorney pointed out that Dr. [redacted] concurred with Dr. [redacted] opinion. The attorney further argued that no full-time positions were available, yet the decision was based on the claimant's ability to work full-time as a substitute teacher. The attorney also noted that the RC used the position description for a teacher's aide when a position description for a substitute teacher should have been used. The attorney further noted that the claimant's teacher's certification request had been denied in [redacted]. The attorney also noted that the Office was aware that the claimant could not qualify for a full-time position. Finally, the attorney argued that Office's decision was improper as the claims examiner acknowledged that the position did not exist in the Dictionary of Occupational Titles (D.O.T.)

The claimant testified that he was not able to work in the identified position because he suffered from hearing loss, a pre-existing condition, and had a military impairment rating of 60%. The claimant further maintained that he suffered from traumatic arthritis in his hands, wrists, and joints. The claimant insisted that he tried to find employment after he completed the community college courses. The claimant admitted that he worked sporadically as a substitute teacher through [redacted]

The claimant testified that he was experiencing recurrent numbness in both arms and may need additional tests and surgery in the future.

Post hearing, a left shoulder MRI report dated [redacted] was submitted along with a medical report dated [redacted] from Dr. [redacted]. The MRI revealed peritendonitis of the supraspinatus tendon secondary to acromioclavicular joint arthropathy and impingement. In his report, Dr. [redacted] opined that the claimant was suffering from pain, numbness, and weakness in both legs, (caused by spinal stenosis), degenerative joint disease, and ruptured discs in the cervical thoracic, and lumbar areas. Dr. [redacted] reported that the claimant was unable to function due to increasing pain and limited ability to walk, sit, bend, or twist.

The attorney provided a letter from the Florida State Department of Education dated [redacted] that indicated that the claimant was not eligible for a Florida Educator's Certificate as he had not completed the required educational [redacted]

requirements; a copy of the FCE; and a copy of the FCE dated

I have carefully evaluated all the evidence of record. I find that the Office failed to meet its burden of proof and did not issue a proper decision in this case.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits. An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.²

The Federal Employees' Compensation Act (FECA) processing guidelines stipulate that an employee who cannot return to the job held at the time of injury due to partial disability as a result of the injury, but has recovered enough to perform some type of work, he or she must seek work or accept suitable work that is offered to him or her.

Under section 8115(a) of the Federal Employees' Compensation Act (FECA), wage earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent the employee's wage-earning capacity, or if the employee has not actual wages, the wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the employee's usual employment, age, qualifications for other employment, the availability of suitable employment, and other factors and circumstances which may affect his wage-earning capacity in his or her disabled condition.³

The Office must initially determine the claimant's medical condition and work restrictions before selecting an appropriate position that reflects the claimant's vocational wage-earning capacity. The Appeals Board has stated that the medical evidence upon which the Office relies must provide a detailed description of the claimant's condition.⁴ FECA processing guidelines stipulate that the Office is responsible for determining whether the medical evidence establishes that the claimant is able to perform the job, taking into consideration medication conditions due to the accepted work-related injury or disability and any pre-

² 20 C.F.R. 10.402, 10.403; Alfred R. Hafer, 46 ECAB 553, 556 (1995).

³ Mary Jo Colvert, 45 ECAB 575 (1994).

⁴ Samuel J. Russo, 28 ECAB 43 (1976).

existing medical conditions. Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.⁵

In this case, the Office relied on the medical opinion from the previous attending physician, Dr. _____, dated _____ along with a FCE dated _____. The evidence of record shows the Office took steps to obtain an updated opinion from the new attending physician in their letter of _____. In a hand-written response annotated on the Office's request, Dr. _____ wrote that he agreed with Dr. _____ assessment and restrictions. Dr. _____ did not provide any other information.

The medical evidence of record includes a report dated _____ from Dr. _____ that indicates that the claimant was suffering from ongoing discogenic pain with nerve root involvement in the low back as well as neural foraminal encroachment in the neck. Dr. _____ discussed surgery and injection options, but opted to continue conservative care at that time.

A subsequent report from Dr. _____, dated _____ submitted by the attorney and discussed above, also indicated that the claimant was suffering from ongoing symptoms, including pain, numbness, and weakness in the lower extremities. Dr. _____ did not provide any detailed opinion on causation but did conclude that the claimant was totally disabled.

In a medical note dated _____ Dr. _____ indicated that the claimant was suffering from chronic pain.

As the attorney noted, Dr. _____ reported on _____ that he agreed with the Dr. _____ medical opinion. While that report dealt mainly with the claimant's impairment as a result of the accepted conditions, Dr. _____ concluded that the claimant's neck and back pain was still present and had worsened since his last office visit in _____.

After the updated FCE, also discussed above, left shoulder MRI findings from _____ were associated with the case file.

While none of these reports conclusively established that the claimant was totally disabled and unable to work, they offer uncontroverted medical evidence that suggested that the claimant was experiencing symptoms that could have been related to the accepted work related condition.

⁵ Carl C. Green, Jr., 47 ECAB 737, 746 (1996).

Before the Office could make a medical determination of partial disability and specific work restrictions, additional development of the medical evidence should have been initiated. Specifically, the Office needed to obtain a detailed and reasoned opinion on the claimant's disability, if any, stemming from the accepted work-related injury and determine whether the claimant was suffering from any ongoing residuals stemming from the accepted work-related injury and subsequent surgery or from any consequential conditions caused by or precipitated by the injury. There is no indication in this case file that additional development of the medical evidence was undertaken.

The determination of whether an employee is physically capable of working, either with or without restrictions, is a medical question that must be addressed in the medical evidence. From a medical standpoint, the Office's determination that the claimant was not totally disabled and capable of returning to work as a Substitute Teacher was not appropriate.

Upon return of the case file, the Office should prepare a statement of accepted facts (SOAF) and refer it, along with the medical evidence of record to a board-certified neurologist for a detailed and comprehensive report that includes the current diagnoses; a rationalized opinion on whether the claimant is suffering from any other conditions caused by or related to the accepted work injury; and a detailed description of the claimant's current restrictions, as a result of the accepted work-related conditions. After finding conclusively that the claimant is physically capable of working in some capacity, the Office should provide that information to the RC for identification of an appropriate position, consistent with the medical restrictions, in accordance with 20 C.F.R. 10.402 and 10.403 and Title 5, U.S.C. 8115(a).

Consistent with these findings, the decision of the District Office dated _____ is hereby **SET ASIDE**.

DATED: **MAY 26 2006**
WASHINGTON, D.C.


Hearing Representative
for
Director, Office of Workers'
Compensation Programs