

File Number:
HR14-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**

DEC 18 2006

Date of Injury:
Employee:

Dear

This is in reference to your workers' compensation claim which has been MODIFIED to accept an aggravation of left shoulder tendonitis with the denial of the remaining conditions AFFIRMED. Pursuant to your request for a hearing, the case file was transferred to the Branch of Hearings and Review.

Your case file has been returned to the District Office at:

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

If you disagree with the decision attached to this letter, you have the right to submit new evidence to the Office of Workers' Compensation Programs and request reconsideration of the case or, if you have no additional evidence to present to the Office of Workers' Compensation Programs, you may appeal the decision to the Employees' Compensation Appeals Board.

(Sincerely,

Hearing Representative

**US POSTAL SERVICE
SOUTH GEORGIA PERFORMANCE CLUSTER
INJURY COMPENSATION OFFICE
451 COLLEGE STREET
MACON, GA 31213**

**PAUL H FELSER, ESQ
FELSER LAW FIRM
7 EAST CONGRESS STREET STE 400
SAVANNAH, GA 31412**

File Number:
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RECONSIDERATION: If you have additional evidence, not previously considered, which you believe is pertinent, you may request, in writing, the OWCP reconsider this decision. Such a request must be made within one year of the date of the attached decision, clearly state the grounds upon which reconsideration is being requested, and be accompanied by relevant evidence not previously submitted, such as medical reports or affidavits, or a legal argument not previously made. Your request for reconsideration and the new evidence you are submitting should be sent to the

US DEPARTMENT OF LABOR
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PO BOX 8300 DISTRICT 6 JAC
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In order to ensure that you receive an independent evaluation of the evidence, your case will be reconsidered by persons other than those who made this determination.

APPEALS: If you believe that all available evidence has been submitted, you have the right to appeal to the Employees' Compensation Appeals Board. Such appeal is limited to the evidence of record, and no new evidence may be submitted. Request for appeal should be made within 90 days from the date of this decision and should be addressed to Employees' Compensation Appeals Board, 200 Constitution Ave., N.W., Room S-5220, Washington, D.C. 20210. For good cause shown, the Appeals Board may waive the failure to file within 90 days if application is made within one year from date of the decision being appealed.

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, United States Code 8101 et seq. of *Claimant; Employed by*
Case No: *Hearing was held on* *in Atlanta,*

The issue in this case is whether problems with the claimant's ankles, feet, hips and pelvis were a direct result of the employment injury and whether his migraine headaches, knee and shoulder problems, ulcers and post-traumatic stress disorder were aggravated by this injury.

The claimant, date of birth, was employed by the in as a Mailhandler. He filed a Notice of Traumatic Injury for an injury of sustained when he was pushing a float onto a lift loaded with mail and injured his back. The claim was initially accepted for a lumbar strain on and compensation benefits were paid for wage loss. An MRI, performed in August showed a mild disc bulge at L4-5 and L5-S1. The claimant's Attending Physician, Dr. referred him to Dr. Dr. neurosurgeon, who diagnosed degenerative disc disease based upon a myelogram.

The claimant began having headaches after the myelogram. Dr. stated on "I think the myelogram that he had seemed to have aggravated his migraine headaches. He did not present rationale for this opinion. He stated the claimant was "unemployable" at the present time and related this to shoulder, back and knee problems as well as the frequent migraines.

On the claimant underwent a functional capacity evaluation. The results of this stated he performed at a "submaximal/inconsistent level" and "refused to perform most activities secondary to subjective complaints of pain." A minimal work level could not be established.

On the District Office referred the claimant to Dr. , orthopedic surgeon, for a second opinion examination. Dr. stated there was no evidence of any residual work-related lumbar strain, but the claimant "still has some diagnostic evidence of lumbar disc protrusion with muscle spasm, and weakness in the right leg and slight atrophy." He related these conditions to the employment injury. He stated the claimant's subjective complaints outweighed the objective findings. Dr. stated the claimant could not return to the date of injury job and provided work restrictions, which he stated would be permanent.

A supplemental report was received from Dr. on Dr. I had ordered an EMG and nerve conduction study. Dr. performed these tests on Dr. performed an examination prior to the testing. She noted the claimant ambulated by cane. An EMG could not be performed due to ketoid scarring over the claimant's body. Dr. stated the nerve conduction study

was consistent with an L4-L5 disc bulge. He provided work restrictions, stating the claimant could work six hours per day with 4 hours' sitting, ½ hour walking, 1 ½ hour standing, 2 hours reaching with 1 hour reaching above the shoulder, 1 hour twisting, no bending or stooping, 1 hour pushing/pulling up to 30 pounds, 1 hour lifting up to 20 pounds, 1 hours climbing, and no squatting or kneeling. Based upon this report, the Office accepted degenerative disc disease at L4-5 and L4-L5 disc bulge. A copy of Dr. report was sent to Dr. for review.

On 1 the District Office sent a copy of the work restrictions to the and asked if the had work available within those restrictions. The Agency provided a Modified Job Offer on as a Mailhandler (Modified). The duties of this position were repairing torn mail and cancellation, facing rejected mail and monitoring placards six hours per day. The physical requirements were within Dr. restrictions. On the claimant stated, "I neither accept nor reject the modified job offer at this time." He stated he had scheduled an appointment with Dr. and would present the job offer to him for his opinion as to whether he could accept the position.

The Employing Agency was contacted on and stated the claimant had not accepted the job, nor had he reported to work. The Agency advised the offered position was still available.

On the claimant submitted a claim form stating the following conditions were directly related to his injury of bilateral leg problems, bilateral feet and ankle problems, bilateral hip problems, and pelvic problems. He stated the following conditions were aggravated by the injury: migraine headaches, bilateral shoulder problems, bilateral knee problems, ulcers and post-traumatic stress disorder.

He submitted several medical reports from Omni Health Solutions and a report from Dr. diagnosing a central bulging disc at L4-5 "and to a lesser degree at L5-S1 with radiculopathy; bilateral shoulder pain; bilateral knee pain; chronic migraine headaches." He stated the claimant had pre-existing low back, shoulder and knee complaints prior to his work injury. "This injury exacerbated his low back pain which with a combination of the shoulder and knee complaints has totally disabled him."

On the District Office requested additional information from the claimant to establish these conditions. The claimant was advised that the office was accepting a spinal headache related to the myelogram but stated there was no evidence to establish a permanent aggravation of his pre-existing migraine headaches was related to the injury. He was also advised that he needed to submit a medical report that included a detailed history of the injury, secure diagnosis, discussion of objective findings and the doctor's opinion as to the relationship between the claimed conditions and the employment injury.

Brief medical notes from Dr. were submitted; however, no detailed narrative medical report was received that was based upon an accurate factual and medical history, citing objective findings in support of the physician's opinion. The request to expand the claim to accept the additional conditions was denied on

On _____, the claimant was advised the offered job remained available and suitable. He was given 30 days to accept the position or provide an explanation for refusing the job.

The claimant disagreed with the Office's decision of _____ and, through his Attorney, Paul Felser, requested an oral hearing with an Office of Workers' Compensation Programs' Hearing Representative.

The claimant responded to the job offer on _____ stating again he neither accepted nor rejected the offer and stated he was in receipt of disability benefits from SSA and from the Office of Personnel Management.

He submitted a _____ report from Dr. _____ who stated the claimant could not return to any kind of gainful employment. He cited the claimant's inability to sit more than 30-40 minutes at a time would prohibit him from sitting at a desk job. In addition, he was unable to work due to the sedation associated with his current medication. Dr. _____ stated the migraines were doing "pretty good" but the use of the cane was aggravating his wrist and shoulder.

The District Office determined that Dr. _____ report conflicted with that of Dr. _____ and referred the claimant for a referee examination with an impartial medical specialist. Dr. _____ specialist in orthopedics, conducted the examination on _____. Dr. _____ stated the claimant required the cane, as "without the cane he tends to have a right lower extremity limp." He stated the claimant's disability was related to disc disease with resultant sciatica, right worse than left. He stated the claimant had permanent limited sitting, standing, walking, bending, pushing, and pulling restrictions. On _____ the District Office accepted bilateral sciatica as compensable.

The hearing concerning the denial of additional conditions was held on _____ in Atlanta, Georgia. The claimant and his spouse were present. Mr. Felser represented the claimant. Mr. Felser stated that due to the severity of the claimant's injury, "It should not be surprising that an individual who has the serious type of back condition and injury that Mr. _____ suffers from would also develop a number of other consequential conditions. And that's, in fact, what has happened in this situation."¹ The claimant used the cane at the hearing. Mr. Felser stated the claimant had a noticeable limp and was in "obvious distress."²

The claimant testified he was in significant pain at the time of the hearing and used the cane due to the damage the back injury did to his right side. He stated he began falling on the right side. He stated he needed the cane to steady himself. He also stated having to shift his weight caused problems with his right knee and his left pelvis and hip.

The claimant testified he had an occasional migraine prior to the injury but the dye from the myelogram aggravated the headaches so that he was having them more frequently. He stated his pelvic, hip ankle and leg problems were a consequence of the employment injury and the knee problem was aggravated by the injury. He had a service-connected knee problem but now has frequent flare-ups of stiffness and giving out of the knee. He stated he has radiculopathy from the employment injury. He also stated his shoulder

¹ Hearing transcript, page 6.

² Transcript, page 6.

problem was aggravated by the injury. He also had a service-connected bursitis of the shoulders and side. He stated his shoulders lock up and ache since the injury. He stated his doctor had told him this was due to the pressure of the cane. He stated his pre-existing ulcer condition had worsened due to "some of the stuff that I go through when I try to talk with Workmen's Comp or some of the stuff they send to me and how they treat me. So - and you know, and I just stay worried about it all the time."³

He testified he had pre-existing post-traumatic stress disorder, and stated it had been aggravated due to being followed by postal and OWCP officials. He stated he and his family members had seen people following him to his doctor and out to eat. He stated he was afraid to leave the house. He stated he has had to increase the frequency of his doctor's visits.

He testified that he has atrophy of the right leg due to the radiculopathy. He stated he is in receipt of SSA and OPM disability benefits. He stated he needed to have his additional medical conditions accepted so he could obtain additional medical care for those conditions. He testified he has been more depressed since his injury as he used to be very active and is unable to perform these activities any more.

Mr. Feiser asked the record be reviewed and the case remanded for additional development if these conditions could not be accepted.

A copy of the hearing transcript was sent to the Postal Service on _____ for review and comment. There has been no response.

Additional medical records have been submitted since the hearing. Many of them were already in the case file, including copies of the _____ myelogram and post-myelogram CT Scan, and Dr. _____ report. An additional report dated _____ from Dr. _____ was received. He stated the claimant now had left shoulder tendonitis due to the fact "that he has to use a walking cane in order to ambulate and he puts so much weight on that left arm that his should has now become aggravated."

In this case the accepted conditions are L4-L5 degenerative lumbar disc, L4-L5 disc bulge, as well as sciatica and a post-myelogram headache. The claimant has requested that problems with his shoulders, pelvis, hips, knees, legs, ankles, and feet, as well as an ulcer and post-traumatic stress disorder be accepted in this case.

An award of compensation may not be based on surmise, conjecture or speculation or upon appellant's belief that there is a causal relationship between his condition and his employment. To establish causal relationship, appellant must submit a physician's report in which the physician reviews the factors of employment identified by appellant as causing his condition and, taking these factors into consideration as well as findings upon examination of appellant and appellant's medical history, state whether these employment factors caused or aggravated appellant's diagnosed conditions and provide medical rationale in support of his opinion.⁴

³ Transcript, pps. 16-17.

⁴ Donald W. Long, 41 ECAB (Docket No. _____, issued October 30, 1989).

In this case, there has been medical evidence with rationale submitted to support only one of the additional claimed conditions. Dr. _____ stated in his report that the claimant had developed an aggravation of left shoulder tendonitis due to the pressure and weight of the walking cane he is required to use. There has been no rationalized medical report submitted to establish any of the other physical conditions are causally related to the employment injury of _____.

The claimant has stated that his ulcer condition was aggravated due to the stress of dealing with Postal officials and OWCP concerning his claim. However, "the processing of a compensation claim bears no relation to appellant's day-to-day or specially assigned duties"⁵ and the claimant's worries and stress that he stated aggravated his ulcer are not considered compensable.

In addition, he states the worsening of post-traumatic stress disorder related to being followed by postal and OWCP officials. While the claimant has made this allegation, there is no corroboration that the claimant was, in fact, followed, or harassed by any agency or OWCP officials. Mere perceptions alone of harassment or discrimination are not compensable. An employee's charge that he or she was harassed or discriminated against is not determinative of whether or not harassment or discrimination occurred.⁶ Since this allegation is not substantiated, this condition would not be compensable.

Therefore, the decision of the District Office dated _____ is hereby MODIFIED to accept the condition of aggravation of left shoulder tendonitis and AFFIRMED as to the denial of the remaining conditions for the reasons set forth above.

DATED: DEC 18 2006
WASHINGTON, D.C.

Hearing Representative
For
Director, Office of Workers'
Compensation Programs

⁵ George A. Ross, 43 ECAB ____ (1991 [Docket No.

issued December 23].

⁶ Sheila Arbour (Vincent E. Arbour), (1992) [Docket No.

issued May 26].