

U.S. DEPARTMENT OF LABOR

JUN - 5 2014

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

Date of Injury:  
Employee:

Dear Ms :

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 04/09/2014. 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 New York City 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 2 NYC  
LONDON, KY 40742-8300

Sincerely,

  
D. Polonsky  
Hearing Representative

PAUL H FELSER, ATTORNEY AT LAW  
FELSER LAW FIRM  
PO 10267  
SAVANNAH, GA 31412

*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.*

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 April 9, 2014.

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The issue for determination is whether the claimant is entitled to compensation for disability compensation benefits claimed for the period \_\_\_\_\_ through \_\_\_\_\_.

The claimant born on \_\_\_\_\_ is employed by the \_\_\_\_\_ in \_\_\_\_\_ as a \_\_\_\_\_. The claimant filed a CA2 Notice of Occupational Disease Claim on \_\_\_\_\_ claiming that due to repetitive physical activities required in her employment that she sustained bilateral lateral epicondylitis and bilateral carpal tunnel syndrome. The claimant stated that she first became aware of her conditions and realized that they were related to her employment on \_\_\_\_\_. By decision dated August 10, 2007 the claimant's claim was denied. The claimant appealed the Office's decision and it was affirmed by reconsideration decision dated October 16, 2008. The claimant appealed the Office's decision and it was accepted by reconsideration decision dated January 8, 2010. The Office accepted that the claimant sustained an aggravation of right elbow epicondylitis and a right elbow strain.

By decision dated February 7, 2011 the Office determined that the claimant sustained a 1% permanent partial impairment of her right arm and schedule award compensation benefits were paid for the period July 28, 2010 through August 18, 2010.

It should be noted that under file number \_\_\_\_\_ which was doubled with the instant claim that on \_\_\_\_\_ that the claimant signed a CA1 Notice of Traumatic Injury Claim claiming that on \_\_\_\_\_ that she sustained a radial nerve contusion of the right elbow due to freeing up mail that was stuck in a mail shaft. By decision dated November 1, 2006 the Office accepted that that the claimant sustained a right elbow sprain.

The claimant stopped working following the injury and returned to work on \_\_\_\_\_. On \_\_\_\_\_ the claimant signed a CA2a Notice of Recurrence Claim claiming that her doctor reduced her work hours because of her injury, but that she did not sustain a new injury. On \_\_\_\_\_ the claimant signed a CA7 Claim for Compensation Form requesting partial disability

compensation benefits for working part-time for the period through On the claimant signed a CA7 Claim for Compensation Form requesting total disability compensation benefits from through On the claimant signed a CA7 Claim for Compensation Form requesting total disability compensation benefits for the period through On the claimant signed a CA7 Claim for Compensation Form requesting total disability compensation benefits for the period through On the claimant signed a CA7 Claim for Compensation Form requesting total disability compensation benefits for the period through It is noted that no disability compensation benefits were paid, and no decisions denying compensation benefits claimed were issued.

In the instant claim on the claimant filed a CA7 Claim for Compensation and CA7a time analysis forms which noted that she worked part of the day on and stopped working completely beginning The claimant requested total disability compensation benefits for the period through The claimant filed additional claims for compensation for total disability benefits through

In his report dated 2007 Dr. stated in relevant parts,

" was my patient for a work-related injury dated left upper extremity, elbow, shoulder, neck, and the wrist, an occupational injury of repetitive nature specifically lateral epicondylitis and cubital tunnel syndrome. ICD code numbers 354.2 and specifically the ICD codes are for cubital tunnel syndrome, 354.2 and for lateral epicondylitis of the tennis elbow, 726.32.

Subsequently, she has had an acute injury while at work while she was handling some heavy magazines for the US Postal Department. A bundle of catalogs struck her right elbow resulting in an acute injury and bruising for which she came under care with me on for an injury that occurred on . Specific diagnosis for that is sprain/strain and ICD code number is 841.8 and also various other diagnoses were made especially as it relates to bilateral elbows of repetitive nature, which is an occupational injury of repetitive nature.

All the treatment she received from me since the initial visit with me on being referred to me by Dr. an orthopedic surgeon was for her left upper extremity problems, a work related occupational injury of repetitive nature. A provisional diagnosis of bilateral lateral epicondylitis, left shoulder impingement syndrome, bilateral carpal tunnel syndrome, and possible ulnar nerve neuropathy were made Specifically the ICD

codes for those diagnoses were 726.32 bilateral, 726.19 left shoulder, 354.2 left ulnar neuropathy, and 354.0 bilateral carpal tunnel syndrome. The explanation as to differentiating these two cases, the best way to go forward would be to have all other diagnoses under one claim that was prior to \_\_\_\_\_ with specifically the diagnosis of sprain/strain elbow and right forearm under ICD number 841.8 and all the other diagnoses to be attributable to the Compensation Claim dated \_\_\_\_\_

“As to the question of her returning to the job, she could return to the job with significant restrictions in both upper extremities, to avoid repetitive nature of activities no more than third of the time with no lifting, pushing, and pulling of more than 10 pounds and limited to a third of the time in a given eight-hour day. This recommendation is based on her job description of a machine operator of sorting out mail of various sizes in weight from anywhere from 10 g to 10 pounds up to 70 pounds

Casual Relationship: Except for the diagnosis of sprain, elbow and forearm, ICD code 841.8 right elbow, all the other conditions are a work related repetitive trauma occupational injuries. The diagnoses codes include bilateral 354.0, bilateral 354.2, left 726.19, and bilateral 726.32.

Disability: The claimant was able to work part-time about four hours. She was disabled for four complete days and then subsequently returned on a limited capacity for four hours a day with significant limitations of repetitive work and limitation as to the weights that she can handle from the injury of \_\_\_\_\_ through \_\_\_\_\_ at which time, she was not given an option to continue under limited work capacity by the ESPS [sic].

Also intermittently after an injection treatment or so, she did lose few days here and there. Also as to the explanation of her prior limitations, the earlier injury dated \_\_\_\_\_ of occupational repetitive nature; she was limited to part-time four hours intermittently with few days here and there lost complete disability with limitations of no more than 15 to 20 pounds on an occasional basis.”

In his report dated \_\_\_\_\_

Dr. \_\_\_\_\_

stated in relevant part,

“The causation of the patient’s symptoms is multifaceted. She works as \_\_\_\_\_ who constantly deals with mail packs that wharey [sic] from few grams in wight [sic] to as much as 35lbs on a constant basis every day using her upper extremities upto [sic] eight hours aday [sic] for the last several years. Such activites [sic] are known to cause the above mentioned medical condition a well established medical facts about occupational injuries of repetitive nature. An injury or \_\_\_\_\_ has brought attention to the subsequent ongoing symptoms of pain on use of upper extremities during the course of doing her work at \_\_\_\_\_, is due the

aggravation of the inflammatory [sic] process that is ongoing from the lateral epicondylitis from repeated [sic] use of her upper extremities [sic] all day long several thousand [sic] times a day for several years. Specifically, the patient has previously noted several injuries related to the current symptoms, but was able to function reasonably well up till the most recent aggravation”

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

“History of Present Illness: This is a \_\_\_\_\_ year old \_\_\_\_\_ Patient was referred by Dr. \_\_\_\_\_. The patient is here today with pain arms, L shoulder elbows and hands. The pain began \_\_\_\_\_. On the POS scale, the patient's pain today is 7/10. On an average day the patient is in pain all the time. The patient describes the pain as sharp, burning, pressure, numbness. The pain gets worse with activities. The pain gets better with no activity [sic], medicine ice/heat. The patient has had the following treatments home exercise [sic].”

“ASSESSMENT:

721.0-cervical spondylosis without myelopathy  
722.52-degeneration of lumbar [sic] or lumbosacral intervertebral disc  
354.0-carpal tunnel syndrome  
7292-neuralgia, neuritis and radiculitis

DISABILITY STATUS:

This patient is currently not working.  
This patient is not on Social Security Disability.  
This patient's injury is Federal through Postal Service.  
This patient's pain management [sic] goal is to go on a daily basis without pain.”

By decision dated October 7, 2013 the Office denied the claimant's claims for compensation benefits for the period \_\_\_\_\_ through \_\_\_\_\_

The decision stated in relevant part,

“This is to advise you that your claim for compensation for the period \_\_\_\_\_ to \_\_\_\_\_ has been denied.”

We received your CA-7 claim for compensation for the above period on \_\_\_\_\_. By letters dated \_\_\_\_\_ we advised your Employing Agency to submit a new corrected Form CA7a showing the exact daily breakdown of the claimed hours. Your Employing Agency was asked to verify your pay status for the period from \_\_\_\_\_ through \_\_\_\_\_. They were also asked to provide us with the exact daily breakdown on Form CA-7a

The Agency was asked to furnish this evidence within 15 days of the date of the last letter, and were advised that failure to do so could result in the denial of the claim. As of this date, we have not received any additional information.

If you disagree with this determination, you may follow any of the courses of action explained in the appeals rights attachment.”

The claimant disagreed with the \_\_\_\_\_ decision and requested an Oral Hearing. A Telephone Hearing was held on April 9, 2014. The claimant did not attend the scheduled 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 Office's decision did not reference medical evidence, or indicate what his client would need to provide to establish her claim since the denial was based solely on the Office's determination that the claimant's employing agency did not respond appropriately to a request for information.

Mr. Felser stated that the claimant was working light duty in her other claim due to her work restrictions and that her job was withdrawn by her employing agency. He further stated that she did not file claims for compensation benefits in the instant claim until 2010 because her claim was not accepted until 2010 due to time frames associated with the appeals process following the initial denial of her claim. Mr Felser argued that the claimant has continued to have work restrictions directly related to her injury in the instant claim which would prevent her from working her full duties

It was explained that generally if a light-duty position is withdrawn due to an employer's inability to accommodate the claimant's work restrictions then generally there is an entitlement to compensation benefits.

On pages 16 and 17 of the hearing transcript Mr Felser argued that if I issued a Hearing decision which affirmed the Office's decision but determined that the medical evidence was insufficient to establish that the claimant was entitled to disability compensation benefits that the Hearing decision would not be appropriately affording the claimant with procedural due process

Mr Felser was afforded 30 days to submit medical evidence to support Ms. McLellan's claim.

Obtaining Information from the Employing Agency (EA). If the CE needs pay or benefits information from the EA prior to making a payment, calling the EA to obtain the information and then documenting the file with a CA-110 (pending receipt of written confirmation) is preferred (as opposed to requests made via mail) so that payments can be made as quickly as possible. This communication can also be accomplished via secure email with the EA to and from a government network.

If the EA does not respond timely to these requests, the CE should request the required information via letter, and a copy of this letter should be forwarded to the claimant. Note - While it may be necessary to send a letter to the EA for pay information, this typically should not delay an initial payment to the claimant, since in most instances payment can be made using a temporary (base or minimum) pay rate while awaiting more precise pay information.<sup>1</sup>

Mr. Felser argued at the Hearing that the claimant was not afforded a way to submit the evidence that the Office determined was necessary to consider her claim because the Office denied the claimant's claims based on the determination that her employing agency did not provide sufficient evidence to adequately process her claims for disability compensation benefits. I find that Mr. Felser presented a valid argument, and that based on the claims filed it is not clear why the Office could not consider processing claims for disability compensation benefits for the periods that the claimant's agency certified that she was in a leave without pay status outside of the continuation of pay period, and consider if the medical evidence of record supported the claims.

A claimant has the burden of proving by a preponderance of the evidence that he or she is disabled for work as a result of an accepted employment injury and submit medical evidence for each period of disability claimed.<sup>2</sup> Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues.<sup>3</sup> The issue of whether a particular injury causes disability for work must be resolved by competent medical evidence.<sup>4</sup>

It is noted that every injury does not necessarily cause disability for work. Whether a particular injury causes a claimant to become disabled for work the duration of that disability are medical issues which must be resolved by a preponderance of the reliable, probative and substantial evidence.<sup>5</sup> Such medical evidence must include findings on examination and a physician's

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<sup>1</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Compensation Claim*, Chapter 2 901 5(a)(2) (February 2013).

<sup>2</sup> See *Fereidoon Kharabi*, 52 ECAB 291 (2001)

<sup>3</sup> *Id.*

<sup>4</sup> See *Jacqueline M Nixon-Steward*, 52 ECAB 140 (2000).

<sup>5</sup> *William Archer*, 55 ECAB 674 (2004)

opinion, supported by medical rational, showing how the injury caused the employment disability for his or her particular work.<sup>6</sup>

The medical evidence of record has been completely reviewed and considered to determine if the claimant established that she is entitled to disability compensation benefits claimed for the period through February

I find that Dr clearly opined that the claimant was disabled due to work restrictions and pain causally related to her work-related injuries for the denied period. Based on Dr. reports I find that Ms. case must be remanded.

The Office may undertake to develop either factual or medical evidence for determination of the claim.<sup>7</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>8</sup> The Office has the obligation to see that justice is done.<sup>9</sup>

I find that, given the absence of any contrary medical evidence, Dr. reports, although lacking sufficient rationale, are sufficient to require further development of the record by the Office.<sup>10</sup>

On **remand** the Office should prepare a Statement of accepted Facts (SOAF) and refer it along with the claimant and pertinent medical records from the instant claim and case number to a Board-certified specialist to obtain a rationalized medical opinion on the issue of whether appellant's claimed disability for the period through and continuing is causally related to work restrictions and pain causally related to her work-related injuries in the instant claim and or her other claim.

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 established entitlement to disability compensation benefits for the period through

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.

<sup>6</sup> *Dean Pierce*, 40 ECAB 1249 (1989)

<sup>7</sup> 20 C F R. § 10 11(b); see also *John J. Carlone*, 41 ECAB 354 (1989)

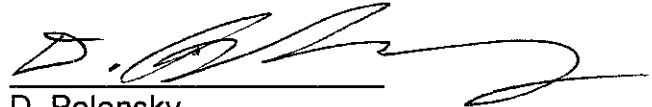
<sup>8</sup> *Dorothy L. Sidwell*, 36 ECAB 699 (1985)

<sup>9</sup> *William J. Cantrell*, 34 ECAB 1233 (1983)

<sup>10</sup> *Rebel L. Cantrell*, 44 ECAB 660 (1993); *John J. Carlone*, 41 ECAB 354 (1989)



Dated: JUN - 5 2014  
Washington, D C.

A handwritten signature in black ink, appearing to read 'D. Polonsky', written over a horizontal line.

D. Polonsky  
Hearing Representative  
for  
Director, Office of Workers'  
Compensation Programs