

File Number:
HR10-D-H

RECEIVED SEP 15 2014

U.S. DEPARTMENT OF LABOR

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

SEP - 4 2014

Date of Injury:
Employee:

Dear Mr

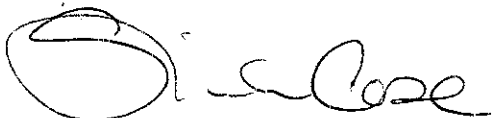
This is in reference to your workers' compensation claim. Pursuant to your request for a hearing, the case file was transferred to the Branch of Hearings and Review

A hearing was held on 07/14/2014. 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 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

Sincerely,



Sheila M. Case
HEARING REPRESENTATIVE

PAUL H FELSER
ESQ
FELSER LAW FIRM
PO BOX 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
Case File: A hearing was held on July 14,
2014.

The issue for determination is whether Mr. has met the criteria for modification of the loss of wage earning capacity decision of record.

born was employed by the
On he was injured in the course of his employment. He filed a claim for traumatic injury which was accepted for lumbar strain and herniated lumbar disc. On April 12, 2004, the Office found he had wage earning capacity in the position of customer service representative. On October 18, 2012, the Office received a request to modify the wage earning capacity decision. On November 29, 2012, the Office requested information in support of this request. On May 29, 2013, the Office denied the claim, finding that he had an intervening, non-work-related injury in such that additional surgery was warranted.

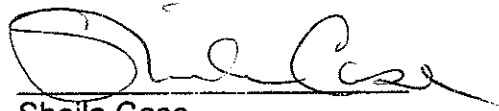
Mr. disagreed with this decision and requested a hearing, which was held on July 14, 2014. He was represented by Paul Felser. At hearing, Mr. Felser argued that in 2003, Drs. and noted that Mr. had a pseudarthrosis that would require additional surgery, and that "there have been additional conditions diagnosed all along the way that should have been upgraded and expanded." He further argued that the 2008 pseudarthrosis correction was authorized at that time by DMA Hogshead.

Review of the file shows that, in its May 29, 2013 decision, the Office solely cited a March 7, 2008 pre-operative report indicating that Mr. suffered an intervening lifting injury at home "the beginning of 07." The Office does not, as Mr. Felser correctly argues, address in any way that it approved the surgery of , after District Medical Advisor (DMA) review. Specifically, on January 11, 2008, the claims examiner who later denied the LWEC modification due to the surgery advised Mr. by telephone that it was approved. Further, on , Dr. , the DMA, did note "claimant has prior 'stand-alone" threaded cages at L45 + L5S1. The AP believes he may have a pseudarthrosis. The procedure or decompression + instrumentation L45 is approved."

Modification of a standing wage-earning capacity determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was erroneous.¹ The Office's procedure manual provides that, if a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In this instance, the claims examiner will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity.² The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination³

In the instant case, Mr. _____ has requested modification of his LWEC decision due to a surgery which the Office approved. Should the Office now, in review of the _____ note, wish to revisit that approval, that must happen prior to deciding that the LWEC decision may not be modified, insofar as it is declining to compensate Mr. _____ for a surgery which continues to have been authorized. As such, the Office's decision of May 29, 2013 denying compensation due to modification of wage earning capacity decision must be set aside and the case **REMANDED** to the Office for handling in keeping with this decision, to include either appropriate development and a decision regarding the approved surgery (and compensation related thereto) or appropriate compensation payment in keeping with the approved surgical procedure.

Dated: SEP - 4 2014
Washington, D.C.



Sheila Case
Hearing Representative
for the
Director, Office of Workers'
Compensation Programs

¹ *Sue A. Sedgwick*, 45 ECAB 211, 215-16 (1993); *Elmer Strong*, 17 ECAB 226, 228 (1965)

² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2 814.9(a) (December 1995) See also FECA Transmittal 10-01 (issued October 5, 2009).

³ *Selden H. Swartz*, 55 ECAB 272, 278 (2004).