

File Number  
HR12-D-H

RECEIVED SEP 19 2016

U.S. DEPARTMENT OF LABOR

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 07/12/2016. Based upon that hearing, it has been determined that the decision of the District Office should be reversed as outlined in the attached 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

Signed Electronically,

Michael McCalley  
Hearing Representative

PAUL H FELSER  
FELSER LAW FIRM, PC  
QUEENSBOROUGH BANK BUILDING  
7393 HODGSON MEMORIAL DRIVE  
SUITE 102  
SAVANNAH, GA 31406

*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.*

Washington DC, September 14, 2016

U.S. DEPARTMENT OF LABOR  
Office of Workers' Compensation Programs

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DECISION OF THE HEARING REPRESENTATIVE

*In the matter of the claim for compensation under Title 5, U. S. Code 8101 et. seq. of*  
*Claimant;* Case No.  
*Telephone Hearing held on July 12, 2016.*

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The issue for determination to be determined is whether the Office's sanction which terminated the claimant's entitlement to further compensation benefits and schedule award was correct and appropriate.

born worked as a for the  
Ms. a Traumatic Injury Notice under case  
on for an incident from On that date,  
Ms. was working at the check point area in the front lobby on the ground floor of the  
VA Medical Center. When a patient fainted, Ms. tried to hold him up to avoid injury  
when she experienced strain in her back plus pain in her arms and legs.

The District office accepted Ms. claims for:

- LUMBOSACRAL STRAIN/SPRAIN
- DISPLACED LUMBAR DISK

Pre-existing or concurrent medical conditions include:

Type 2 diabetes, arterial hypertension, systemic Lupus Erythematosus (SLE), Transient Ischemic Attack (TIA or stroke), Obesity, Rheumatic Disease, Chronic Obstructive Pulmonary Disease (COPD), Carpal Tunnel Syndrome (CTS), and lumbosacral neuritis unspecified.

Ms. is not noted to have worked beyond Ms. relocated  
from to in.

Ms. has undergone the following:

- Bone Mineral Density study on
- EMG/NCV testing of the bilateral upper and lower extremities on
- Bone Scan on

- CT scan of head on [redacted] repeated on [redacted]
- MRI scan of brain on [redacted]
- EMG/NCV testing of the bilateral lower extremities on [redacted]
- MRI scan of lumbar spine on [redacted]
- EMG/NCV testing of the bilateral upper and lower extremities on [redacted]
- Functional Capacity Evaluation (FCE) on [redacted]
- MRI scan of thoracic spine and lumbar spine, both on [redacted]
- EMG/NCV testing of the bilateral lower extremities on [redacted]
- Second opinion examination at the request of the District Office with Dr. [redacted] (Orthopedics) on [redacted]. Dr. [redacted] opined that the accepted sprain has resolved, but her displaced lumbar disk has progressed into degenerative disk disease. Because the claimant's injury residuals were ongoing, Ms. [redacted] was not believed capable of resuming full duty work. However, Dr. [redacted] did feel that she could perform sedentary work with lifting limited to 5 pounds. The recommendation was for an initial return to work for 4 hours per shift, progressing to 8 hrs per shift over the course of the next 6 months.

Weight of medical opinion with respect to Ms. [redacted] ability to work was accorded to Dr. [redacted] based on his [redacted] report. Her case was referred to the District Office's vocational rehabilitation specialist on [redacted] to assist in identifying potential employment opportunities. The instruction given was for the rehabilitation counselor to first identify opportunities with the claimant's former federal employer. Upon receipt of the referral, Ms. [redacted] case was assigned to rehabilitation counselor [redacted].

The VA offered the position of [redacted] to Ms. [redacted] at their location in [redacted]. The date of the job offer is [redacted] revised [redacted] and [redacted].

The Jacksonville District Office found the position suitable. Per outgoing letter from the District Office (dated [redacted]), Ms. [redacted] was advised that the position of [redacted]—offered [redacted]—was suitable. She was advised to report for work within the next 30 days or provide a valid reason for her refusal of it.

Ms. [redacted] did not report for work within the time allotted. Per outgoing letter from the District Office (dated [redacted]), it was noted that Ms. [redacted] had refused the position of [redacted] offered by the [redacted] in [redacted]. Medical records received in response to the District Office's [redacted] job suitability letter were listed. There was also a letter from attorney Paul Felser (dated [redacted]). The second opinion examiner was not believed to have considered the claimant's medical conditions in their totality when commenting on her ability to work. For that reason, the district office's finding of suitability with respect to the [redacted] job was believed to be erroneous.

Mr. Felser also felt that the description of the job offer was not sufficiently specific and that it exceeded Ms. [redacted] work tolerances.

The District Office addressed Mr. Felser's objections over \_\_\_\_\_ but still found it suitable. Ms. \_\_\_\_\_ was given another 15 days to report for work or face a sanction decision.

Her refusal of the \_\_\_\_\_ continued. A vocational rehabilitation report and a completed CA-1032 form were received beyond the date of the \_\_\_\_\_ letter. The sanction was issued on \_\_\_\_\_ with a corrected sanction issued on \_\_\_\_\_

Ms. \_\_\_\_\_ and Mr. Felser disagree with District Office's \_\_\_\_\_ sanction decision. Per timely submission dated \_\_\_\_\_ and received \_\_\_\_\_ Mr. Felser has requested a hearing on Ms. \_\_\_\_\_ behalf in appealing the sanction decision. A telephone hearing was held on July 12, 2016. Ms. \_\_\_\_\_ was not present for the hearing. In her absence, she was represented by attorney Paul Felser.

He was invited to talk about his disagreement with the District Office's decision, citing any evidence not believed to have been given sufficient consideration. Mr. Felser was invited to identify any erroneous action, procedural error or error in logic on the part of the District Office. He was invited to elaborate on any evidence which shows that the job offer was not suitable or that Ms. \_\_\_\_\_ medically incapable of working the job offered.

Mr. Felser first discussed the second opinion report from Dr. \_\_\_\_\_ Dr. \_\_\_\_\_ diagnosed degenerative disk disease which has not been accepted by the District Office.

Mr. Felser made reference to the FCE that Ms. \_\_\_\_\_ underwent in \_\_\_\_\_ noting that the test ought to have been more current when referencing it with respect to any return to work. In reviewing the test report, Mr. Felser observed that while the claimant was unable to complete all aspects of the test, the result was valid. The test showed that the claimant was only able to sit for 40 minutes. There was nothing which showed that Ms. \_\_\_\_\_ condition improved since the FCE test date.

The limited duty job offered to Ms. \_\_\_\_\_ entailed prolonged sitting. Mr. Felser believes that the sitting required by the \_\_\_\_\_ exceeds her work tolerances. The job offer lacks any explanation as to how her limited ability to sit would be accommodated in the telephone position offered.

Mr. Felser finds fault with the District Office's vocational rehabilitation efforts in that there was no transferable skills analysis which would give a fair indication as to what Ms. \_\_\_\_\_ vocational abilities are. Mr. Felser pointed out that the claimant's first language is Spanish; her English-speaking skills and her education are limited. He argues that since the \_\_\_\_\_ offered to Ms. \_\_\_\_\_ requires that she be bilingual; her English-speaking abilities are not proficient enough for her to be considered bilingual. Ms. \_\_\_\_\_ has always spoken to Mr. Felser via conference call where her daughters act as interpreters.

When questioned about the written submissions in Ms. [redacted] record, Mr. Felser explained that she was either assisted by her daughters in their preparation or her daughters prepared them for her submission.

Mr. Felser further argued that the claimant lacks the technical expertise to perform [redacted] duties. He felt that there should've been additional medical and vocational testing performed before determining that the [redacted] job Ms. [redacted] refused was suitable.

At the close of the hearing, it was explained that if the [redacted] decision is to be reversed or remanded there needs to be evidence or argument which establishes that it was erroneous or that further consideration should now be given. The case record was held open for 30 days beyond the date of the hearing to allow for submission of any additional evidence to be considered when a decision was made.

Evidence received beyond the date of the [redacted] hearing consists of the following:

- Letter from Mr. Felser (dated [redacted] in follow-up to the [redacted] which provides a summary of the arguments made on Ms. [redacted] behalf. She relocated from [redacted] to [redacted] so that family could provide assistance with activities of daily living. Second opinion examiner Dr. [redacted] restricted Ms. [redacted] to 2 hrs of sitting per shift. Though there was clarification that Ms. [redacted] 2 hr sitting restriction would be accommodated in the [redacted] position, it was unknown as to how. Mr. Felser also questioned what Dr. [redacted] basis would be for sitting as long as 2 hrs at a time when the FCE (deemed valid) indicated that she could only sit for 40 minutes. Mr. Felser did not feel that Dr. [redacted] report reflected sufficient consideration of Ms. [redacted] medical records or to her non-work related medical conditions. Mr. Felser believes that the description of the job offered to Ms. [redacted] was "generic," lacking specific discussion of the duties to be performed. Additionally, Mr. Felser argues that while Ms. [redacted] date of injury job was that of a [redacted] the position of [redacted] —where use of a [redacted] would be required—is not vocationally suitable. Her limited command of English also renders the [redacted] position vocationally unsuitable. Mr. Felser's memo reflects having reviewed the vocational records in Ms. [redacted] file. The RC (rehab counselor) was asked to identify job opportunities in [redacted] as well as in [redacted] but Mr. Felser found nothing which supports that any such effort was made on part of the RC. The vocational rehabilitation effort was argued to be insufficient. In concluding his submission, Mr. Felser believes that Ms. [redacted] is entitled to a more thorough suitability analysis than given when the sanction decision was issued.
- Statement from [redacted] (dated [redacted] attesting to Ms. [redacted] limited English speaking abilities.

The arguments presented at the July 12, 2016 hearing and the submissions received beyond the hearing are evaluated in light of the evidence previously received. The determination is that the October 16, 2015 sanction from the District Office should be REVERSED.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits. This includes cases in which the Office terminates compensation under section 8106(c)(2) of the Act for refusal to accept suitable work. The Act provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee is not entitled to compensation.<sup>1</sup>

Section 8106(c)(2) of the FECA provides that a partially disabled employee who: (1) refuses to seek suitable work; or (2) refuses or neglects to work after suitable work is offered is not entitled to compensation. An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.<sup>2</sup>

An employee who refuses or neglects to work, after suitable work has been offered or secured for the employee, has the burden of showing that such refusal or failure to work was reasonable or justified and shall be provided with the opportunity to make such a showing before entitlement to compensation is terminated. To justify termination, the Office must show that the work offered was suitable and that claimant was informed of the consequences of her refusal to accept such employment.<sup>3</sup>

The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by medical evidence.<sup>4</sup>

In 1987 the pertinent regulation applied only to former employees, employees who were terminated from the agency's employment rolls. However, the regulation in effect since 1999 contains no such restrictive language. The regulation now states that the employer "should" offer suitable reemployment where the employee currently resides, if possible. (20 C.F.R. § 10.508 (1999)). This regulation applies to both those employees who are no longer on agency rolls and those employees who continue on the agency rolls.

If an employee moves or relocates, while on agency rolls, from the area in which the employing establishment is located, such a move is an unacceptable reason for refusing to accept an offer of suitable employment.<sup>5</sup>

The Employees' Compensation Appeals Board has held that relocation for personal reasons is insufficient to constitute a reasonable basis for refusal of suitable work.<sup>6</sup>

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<sup>1</sup> *Shirley B. Livingston*, 42 ECAB (Docket No. 91-0553, issued August 21, 1991).

<sup>2</sup> *Edward P. Carroll*, 44 ECAB (Docket No. 91-1323, issued December 29, 1992); *Charlene R. Herrera*, 44 ECAB (Docket No. 92-152, issued January 7, 1993); *Patsy R. Tatum*, 44 ECAB (Docket No. 91-1422, issued February 19, 1993); *Bradley L. Mattern*, 44 ECAB (Docket No. 92-2132, issued July 6, 1993).

<sup>3</sup> *Kathy E. Murray*, 55 ECAB (Docket No. 03-1889, issued January 26, 2004).

<sup>4</sup> *Kathy E. Murray*, 55 ECAB (Docket No. 03-1889, issued January 26, 2004).

<sup>5</sup> *Edward P. Carroll*, 44 ECAB (Docket No. 91-1323, issued December 29, 1992).

<sup>6</sup> *J.A.*, Docket No. 07-87 issued February 11, 2008.

