

File Number:  
HR13-D-H

RECEIVED MAY 17 2019

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

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 preliminary review was completed on the case. Based upon that review, 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

Sincerely,

Division of Federal Employees' Compensation

PAUL H FELSER  
FELSER LAW FIRM, P.C.  
7393 HODGSON MEMORIAL DRIVE  
SUITE 102  
SAVANNAH, GA 31406

*If you have a disability and are in need of communication assistance (such as alternate formats or sign language interpretation), accommodation(s) and/or modification(s), please contact OWCP.*

Washington DC, May 14, 2019

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; Employed by the in Case No.*

*Merit consideration of the case file was completed in Washington D.C. Based on this review,  
the decision of the District Office dated March 18, 2019 has been reversed for the reasons set  
forth below.*

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The issue for determination is whether the Office properly determined the claimant's wage-earning capacity based on her ability to earn wages as a

The claimant was employed as a by the in  
On March 21, 2007 she filed a form CA-1, Notice of Traumatic Injury, claiming that  
on she pushed a tray of mail and turned to the left and felt pain and a pop  
in her back. The Office accepted thoracic intervertebral disc disorder with myelopathy as  
work related.

The Office referred the claimant for a second opinion orthopedic examination which was  
performed on October 10, 2018 by , M.D. In a report dated October 11, 2018,  
Dr. found that the claimant could perform full time sedentary work with the following  
restrictions: pushing, pulling and lifting 20 pounds for 2.5 hours; sitting for 7 hours; walking,  
standing, reaching, reaching above shoulder, twisting bending and stooping for 2 hours; no  
operating a motor vehicle at work; and operating a motor vehicle to and from work for 1.5  
hours.

Based on Dr. work restrictions, the Office referred the claimant for vocational  
rehabilitation. The Office selected the positions of and  
Representative as suitable vocational goals.

Rehabilitation Counselor, performed a Labor Market Survey and  
determined that the claimant could perform the positions of and  
and the positions were available in the claimant's commuting area.

The Office determined that the claimant possessed the necessary education and experience,  
and that the duties of the position of were within her medical restrictions. The  
Office determined that the position of was vocationally suitable because she  
received extensive computer and customer skills training at

Washington DC, May 14, 2019

from January 24, 2013 through May 21, 2013 and completed 76 hours of training to prepare for entry level employment in the selection positions.

By letter dated February 8, 2019, the Office proposed to reduce wage-loss compensation benefits for the reason that the position of \_\_\_\_\_ is medically and vocationally suitable and fairly and reasonably represents her wage-earning capacity. By decision dated March 18, 2019, the Office finalized the proposed reduction.

The claimant, through her attorney, Paul H. Felser, disagreed with the March 18, 2019 decision and requested an oral hearing with an OWCP representative.

I have conducted an initial review of the file and find that the case is not in posture for a hearing at this time. I find that the decision of the District Office dated March 18, 2019 should be reversed because the District Office did not meet its burden to justify its reduction of benefits.

Once the OWCP accepts a claim, it has the burden of justifying termination or modification of compensation.<sup>1</sup> When vocational rehabilitation efforts do not succeed, the claimant's wage-earning capacity must be determined on the basis of a position deemed suitable but not actually held.<sup>2</sup> In making this determination, the test is whether the claimant's wage earning capacity based on the selected job appears reasonable, giving due regard to the following factors specified in 5 U.S.C. §8115 of the Federal Employees' Compensation Act (FECA):

- (1) the nature of his injury;
- (2) the degree of physical impairment;
- (3) his usual employment;
- (4) his age;
- (5) his qualifications for other employment;
- (6) the availability of suitable employment;
- and
- (7) other factors or circumstances which may affect his wage-earning capacity in his disabled condition.

In assessing a claimant's ability to perform the selected position, the Office must consider not only physical limitations, but also education, age and prior experience. While generally in accordance with established procedures for determining wage-earning capacity the Office relies upon its wage-earning capacity specialist for selection of an appropriate position, the Employees' Compensation Appeals Board has held that it is the responsibility of the Office to obtain confirmation, not simply an indication, of the specific requirements for the position and that the claimant has the necessary vocational skills to perform the requirements of the position.<sup>3</sup>

<sup>1</sup> 45 ECAB 316 (1994);

56 ECAB 677 (2005).

<sup>2</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, Determining Wage-Earning Capacity Based on a Constructed Position, Chapter 2-0816.1 (June 2013).

<sup>3</sup> 40 ECAB 381 (1988).

Reference is made to the prior Branch of Hearings and Review decision dated May 8, 2015, which reversed the September 29, 2014 decision wage-earning capacity decision because the District Office had not met its burden to show that the position of

was vocationally suitable. The hearing decision noted that I Ph.D., who had performed a Wechsler Adult Intelligence Scale, Fourth Edition, a clinical interview, and interest inventory on December 27, 2012, found the claimant to have substantial difficulty with verbal fluency and ease of communication. He also found that the claimant had an IQ of 76, which placed her in the category of borderline mental retardation (intellectual deficiency). The hearing decision noted that the Rehabilitation Counselor made no reference to Dr. findings as it pertained to the claimant's noted deficiencies with regard to verbal communication and failed to address why the position of

was vocationally suitable in light of this finding. Given the fact that the Rehabilitation Counselor had determined that the claimant had no transferrable skills and Dr. had identified an intellectual deficiency, the hearing decision found that the training the claimant received was insufficient to meet the specific vocational preparation required for that position.

Subsequent to the May 8, 2015 decision, the record does not reflect that the claimant has had any further training nor undergone any psychological testing to evaluate her ability to perform the skills required of a . The job description for the position of requires frequent talking. The Rehabilitation Counselor has not explained why, despite Dr. findings regarding the claimant's verbal and intellectual deficiencies, the claimant has the verbal and intellectual ability to perform the position, and that her training from 2013 is still relevant and useful for this position. Rather, the Rehabilitation Counselor has failed to address these psychological factors entirely. Consequently, I find that the March 18, 2019 wage-earning capacity decision does not provide sufficient rationale to explain how the position is vocationally suitable based on the deficiencies identified by Dr

Because the Office did not meet its burden to justify its reduction of wage loss compensation, the Office should reinstate the claimant's benefits retroactive to the date of termination, paying compensation only if she completes a form CA-1032.

For the reasons set forth above, the decision of the District Office dated March 18, 2019 is hereby **reversed**.

Issued:  
Washington, D.C.

Hearing Representative  
Branch of Hearings and Review  
for  
Director, Office of Workers'  
Compensation Programs

Washington DC, May 14, 2019