

File Number:
HR10-D-H

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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 hearing was held on _____ 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

Electronically Signed

Division of Federal Employees' Compensation

PAUL H FELSER
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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, September 25, 2019

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 number Hearing was held by telephone conference on

The issues for determination are (1) entitlement to medical benefits and (2) whether additional medical conditions are causally related to an accepted injury.

The claimant is employed as an electronics mechanic. On the claimant filed a timely Notice of Traumatic Injury and Claim for Compensation, claiming that on she sustained injury to her low back when she sat down in a hydraulic chair and the seat went down to the base. The Office accepted the claim for low back contusion and lumbar sprain. The claimant stopped work and returned in a full-time modified duty position.¹

 MD, in a report provided an accurate history and findings of normal lumbar spine alignment, no tenderness to palpation at midline or paraspinals, tenderness at S1 left, functional range of motion, 5/5 lower extremity strength, intact sensation, and negative straight-leg raising. Pain complaints were 2 on a 1-10 scale. Dr. concurrent conditions of scleroderma and lupus. Dr. opined that the accepted lumbar sprain remained active.

A report of lumbar MRI dated stated an impression of multi-level degenerative disc disease, retrolisthesis at L3-4, multi-level disc bulges, multi-level foraminal stenosis.

The Office prepared a Statement of Accepted Facts (SOAF) dated Such SOAF described the injury and also noted a prior accepted right hip injury.² Such SOAF also described the full duty electronics mechanic position. Such SOAF also listed non-occupational conditions including lupus and intervertebral disc disorder.

The Office referred the claimant to MD, a board-certified orthopedic surgeon, for a second opinion medical examination. In a memorandum of questions for the medical

¹ See form CA3 dated

² OWCP file number date of injury , , accepted for right hip sprain, resolved.

examiner dated , the Office stated that pre-existing and non-occupational conditions were not compensable and should not be commented upon.

Dr. examined the claimant, reviewed the SOAF and medical records of file, and submitted a report dated . Dr. stated an accurate history and provided findings of good range of motion, no deformity, negative straight-leg raising, and no significant spasm. Dr. opined there were no objective findings of either accepted condition. Dr. concluded that the accepted low back conditions had resolved, and the claimant could work full duty as an electronics mechanic.

Dr. noted that pain complaints were reported (Dr.) at 2 on a 1-10 scale. Dr. concluded that pain associated with the prior work-related right hip injury and underlying lumbar degenerative conditions had returned to the baseline level. Dr. had no recommendation for further treatment apart from a home exercise program.

On the Office issued a notice of proposed termination of medical benefits, advising the claimant that the weight of medical evidence showed that the claimant had recovered from the injury. The Office noted that the weight of medical evidence was accorded to Dr. opinion. The Office stated that entitlement to wage loss benefits was not relevant because the claimant was working full time without any wage loss. The claimant was advised that she could submit additional evidence or argument within thirty (30) days.

In a report Dr. opined that lumbar sprain remained active. Dr. referred to the MRI. The doctor did not provide examination findings.

In a report , MD, provided an accurate history and findings of lumbar tenderness to palpation painful range of motion, 4/5 right lower extremity strength, and positive straight-leg raising. Dr. stated an assessment of lumbar spondylosis, lumbar radiculopathy, lumbago with sciatica and stenosis. Dr. noted that the Office accepted only a lumbar sprain in connection with the work incident. Dr. did not opine as to causal relation between such incident and additional conditions.

In a letter of claimant's representative, Paul Felser, Esq., argued that the right hip injury remained active. Counsel argued that Dr. opinion established that the accepted lumbar sprain remained active and also that additional diagnosed conditions were casually related to the work incident. Counsel argued that the reference to non-occupational and pre-existing conditions in the Office's memorandum to Dr. constituted a leading question.

On the Office notified the claimant that the proposed termination of medical benefits would be made final effective . The claimant disagreed and requested an oral hearing.

Accordingly, a hearing was scheduled and held by telephone conference on . The claimant did not attend the hearing. Counsel presented oral argument. Based upon a review of the hearing testimony and written evidence of record I find that the Office's decision should be set aside.

Prior to the hearing the Office received additional written evidence. In a report Dr. stated that x-ray studies disclosed degenerative changes in the lumbar spine. Dr. opined that such findings were consistent with the history of injury.

At the hearing counsel repeated the arguments contained in his letter. Counsel argued that Dr. report was not definitive as to whether additional medical conditions were causally related to the work incident.

Post hearing the record was held open for 30 days to allow for submission of additional written evidence. A copy of the hearing transcript was provided to the employing agency and 20 days allowed for submission of written comments. No comments were received.

Post hearing the Office received a report by MD, dated . Dr. provided an accurate history of injury. Dr. stated that a CT scan showed a synovial cyst at L4-5 and foraminal narrowing. Dr. opined that the work incident aggravated underlying lumbar degenerative disc disease as documented by the CT scan as well as a finding of numbness in the left toes and diminished functional capacity. Dr. opined the claimant required lumbar fusion surgery at L4-5.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.³ To terminate authorization for medical treatment, the Office must establish that the claimant no longer has residuals of an employment related condition.⁴

The Federal Employees' Compensation Act (FECA) provides for the appointment of a referee (also called an "impartial") physician to examine the claimant and resolve a conflict of medical opinion in a case.⁵ A referee examination is needed when the Office determines that a conflict exists between medical opinions of approximately equal value. A conflict exists when there is a disagreement between the opinions of an attending physician and a physician designated by the United States.⁶ When there are opposing reports of virtually equal weight and rationale, the case must be referred to a referee medical specialist, pursuant to section 8123(a) of the FECA, to resolve the conflict in the medical evidence.⁷

The opinions of Drs. and are of virtually equal weight and rationale. Both physicians provided an accurate history of injury and made reference in their reports to

³ *Kelly Y. Simpson*, 57 ECAB 197 (2005)

⁴ *Beverly J. Duffey*, 48 ECAB 569 (1997)

⁵ 5 U.S.C. §8123(a)

⁶ Federal (FECA) Procedure Manual, Part 3—Medical, *OWCP Directed Medical Examinations*, Ch. 3-500-4(a) (July 2011)

⁷ *Darlene Kennedy*, 57 ECAB 414 (2006)

findings on examination and results of diagnostic tests. The doctors however presented different findings and reached opposite conclusions as to the extent of injury-related conditions. A conflict of medical opinion thus exists, and a referee medical examination is required to resolve such conflict.

As discussed above, opinions by Drs. _____ and _____ are not rationalized as to causal relation. Counsel's argument as to a leading question presented to Dr. _____ by the Office is without merit. The SOAF properly referenced non-occupational and pre-existing conditions.⁸ A leading question is a question that suggests or implies an answer to the question posed.⁹ The reference in the Office's _____ memorandum regarding non-occupational and pre-existing conditions was not a question posed to Dr. _____. It follows that there was neither a leading question nor an implied response to a question actually posed.

The Office's decision of _____ is hereby set aside and REMANDED.

Upon return of the case file, the Office should merge the present file with file number _____ to facilitate cross-referencing of medical records.

The Office should update the SOAF as needed and prepare questions for the referee examiner, and then refer the claimant, SOAF, questions and the case file to an appropriate board certified medical specialist for a referee medical examination.

The claimant should be instructed to bring to the referee examination the films or discs of the _____ MRI, the _____ CT scan, and x-rays referenced by treating physicians.

The referee medical examiner should be asked for a report which contains findings on examination as well as a rationalized medical opinion as to (1) whether an accepted condition remains active, (2) whether the _____ work incident contributed to or aggravated any additional conditions of the lumbar spine, and (3) whether lumbar fusion surgery is medically necessary to treat an injury-related condition. Upon receipt of the referee medical specialist's report, and any additional development deemed necessary, the Office should issue a *de novo* decision as to medical benefits.

As the Office did not meet its burden for terminating medical benefits, the claimant is entitled to restoration of such benefits retroactive to _____

⁸ Federal (FECA) Procedure Manual, Part 2—Claims, *Statements of Accepted Facts*, Ch. 2-809-6(a)(4) (September 2009)

⁹ *Brenda C. McQuiston*, 54 ECAB 816 (2003)

Issued:
Washington, D.C.

Electronically Signed
Hearing Representative
for
Director, Office of Workers'
Compensation Programs