

File Number:
HR10-D-H

RECEIVED AUG 03

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

Sincerely,

[Electronically Signed]

Hearing Representative

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, July 31, 2017

File Number:
HR10-D-H

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

Washington DC, July 31, 2017

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 No.

The issues for determination are (1) whether the Office of Workers' Compensation properly found an overpayment of compensation of \$43851.16; (2) whether the claimant is with fault in the creation of the overpayment; and, if not, (3) whether recovery of the overpayment may be waived.

The claimant, date of birth _____, was employed as a _____ by the _____ . On _____ the claimant filed a timely claim of traumatic injury _____ claiming multiple injuries due to a motor vehicle accident. The office initially accepted the claim for neck and lumbar strains, left metacarpal fracture, concussion and pelvis fracture. He reported returning to part-time, self-employment in _____. On _____, the office terminated the claimant's benefits with regard to his physical injuries. However, his benefits remained with regard to his concussion and related post-concussion syndrome. The claimant was referred for Vocational Rehabilitation Services.

In a _____ reconsideration decision, the office expanded the accepted conditions to include cervical facet condition (traumatic spondylopathy) and herniated discs at the C4-C7.

On _____ the office formally reduced the claimant's benefits on the basis that he was capable of earning wages as a sales clerk.

In _____ the office expanded the claim to include headaches.

In _____ the claimant filed a claim of recurrence, indicating that his condition had deteriorated. The office advised the claimant that he would need to request modification of the wage earning capacity decision. The office subsequently denied modification on _____. The decision was affirmed through hearing decision dated _____. The claimant subsequently requested reconsideration.

On _____ the office expanded the claim to include Adjustment Disorder with Obsessive Compulsive Features, Cervical radiculopathy, Cervical neuroforaminal stenosis, left hip arthritis/degenerative disease and left hip spurs formation.

By letter dated _____ the claimant was asked to provide evidence with regard to his employment and income dating back to _____. The claimant subsequently provided his tax returns. He participated in a conference call to discuss his work activity and earnings as well.

By reconsideration decision dated _____, the examiner advised that the claimant's _____ wage earning capacity decision should be modified as the evidence received indicated he was no longer capable of working as a sales clerk. This was retroactive to _____. However, she noted he would still need to establish his current wage earning capacity. The office subsequently provided retroactive payment for the adjustment to his compensation from _____ through _____.

A memorandum to the file dated _____ advised that the claimant's ongoing earnings from _____ still needed to be clarified and or established. The claimant subsequently provided partial earnings information but no supporting evidence. The office then provided the claimant with a schedule award for a 31 percent permanent partial impairment of the left lower extremity and a 7 percent permanent partial impairment for the right lower extremity. The award ran from _____ through _____.

The claimant reported no income on his CA1032 forms during the period of the award.

In _____, the employer advised that the claimant had a consulting business with a website indicating annual income of \$100,000. They submitted a copy of the web page indicating annual revenue of \$100,000. The office advised the employer that the claimant would be placed back upon compensation under a wage earning capacity. However, the office then placed the claimant on total disability compensation. The employer questioned the action.

On _____, the office requested tax returns and W2 forms from the claimant for the years of _____ and _____. The claimant provided the requested information. The employer advised that their investigation indicated the claimant was actively involved in business ventures, separately served as an officer in his wife's business and also served in his community homeowners association.

The office advised the employer that the claimant's attorney had requested an extension on the claimant's entitlement to compensation. They further advised that they would be sending the claimant for additional medical evaluation.

The claimant advised on his _____ CA1032 form that while he did not earn income, he was "involved" in his wife's businesses for a few hours a week. The claimant provided a similar answer on his CA1032 in _____.

In _____, the employer again requested review of the claimant's entitlement to compensation. In _____, the office deleted compensation for total disability and reinstated the claimant's prior wage earning capacity amount.

By preliminary overpayment decision dated [REDACTED] the office advised the claimant that he had been overpaid \$43,851.16 because he received total disability compensation for the period of [REDACTED] through [REDACTED], when he should have received partial disability compensation based upon the prior wage earning capacity decision. The office advised the claimant that he was with fault in the matter.

The claimant disagreed with the preliminary decision and requested a pre-recoupment hearing before an OWCP representative.

Hearing was held on [REDACTED]. The claimant was represented by Paul Felser. The claimant did not appear.

At hearing, Mr. Felser discussed the history of the case and indicated he thought the preliminary overpayment decision was not valid. He indicated they would be providing financial information after the hearing.

A transcript was provided to the employer and the claimant. Both were afforded 20 days to respond to the transcript.

In addition, the case record was held open for 30 days in order to allow the claimant time to submit any additional evidence.

Mr. Felser provided a brief indicating the claimant had no earnings.

The employer provided a response to the transcript advising that they believed there were additional periods of overpayment and would endorse setting aside the preliminary overpayment decision for additional review of the claim. The claimant and his attorney provided rebuttal to the employer's comments.

Based upon a thorough review of the hearing testimony as well as the written evidence of record, I find that the preliminary overpayment decision dated [REDACTED] should be set aside for the office's additional review of the evidence of record. I note that objective findings with regard to the claimant's accepted physical conditions indicate the claimant is capable of work activity. I note as well that disability is being attributed to the claimant's post-concussion syndrome primarily based upon the claimant's assertions regarding his symptoms. I find that the evidence provided by the employer is compelling that the claimant is capable of earning wages. I further find it troubling that the claimant did not appear at hearing to respond under oath with regard to his activities. However, I find that the office has not established the claimant's actual wage earning capacity for the period of the overpayment.

Consistent with the above findings, the preliminary overpayment decision of the District office dated [redacted] is set aside and the case returned to the office for the action described above.

ISSUED
WASHINGTON, D.C.

[Electronically Signed]

Hearing Representative
For
Director, Office of Workers'
Compensation Programs