

RECEIVED OCT 11 2006

U.S. DEPARTMENT OF LABOR

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

OCT 3 2006

Date of Injury: 05/09/2003
Employee: DAVID B. MINER

DAVID B MINER
1207 MARKSVILLE ROAD
STANLEY, VA 22851

Dear Mr. MINER:

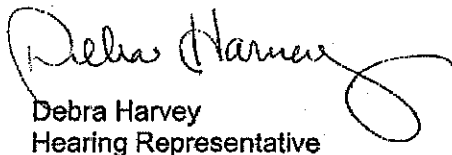
This is in reference to your workers' compensation claim. Pursuant to your request for a hearing, the case file was transferred to the Branch of hearings and Review.

A preliminary review has been completed, and it has been determined that the case is not in posture for a hearing at this time. The decision of the District Office has been vacated and returned to the district office for further action as explained in the attached Remand Order.

Future correspondence should be addressed to: U.S. Department of Labor, Office of Workers' Compensation Programs:

US DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 25 WAS
LONDON, KY 40742

Sincerely,


Debra Harvey
Hearing Representative

US DEPARTMENT OF INTERIOR
NPS-REGULAR EMPLOYEE FUNCTIONS
SHENADOAH NATIONAL PARK
3655 US HIGHWAY 211 EAST
LURAY, VA 22835

PAUL H FELSER
ESQ
FELSER LAW FIRM, P.C.
P.O. BOX 10267
SAVANNAH, GA 31401

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 David B. Miner; Claimant; Employed by the United States Department of Interior, Shenandoah National Park, Luray, Virginia. Case No. 252030439.

Merit consideration of the case file was completed in Washington, D.C. Based on this review, the decision of the District Office dated April 25, 2006 is set aside and the case file is remanded for the reasons set forth below.

The issue is whether the District Office properly terminated compensation benefits for the reason that no continuing employment-related disability existed.

The claimant, date of birth, October 28, 1950, was employed by the U.S. Department of Interior, Shenandoah National Park, as a Maintenance Worker. He filed a Notice of Traumatic Injury on May 15, 2003 for an injury of May 9, 2003 when he injured his low back lifting a heavy bag of trash from a trashcan. The claim was initially accepted for a lumbar strain. The claimant stopped working on May 15, 2003. He was in receipt of Continuation of Pay from May 15, 2006 through June 28, 2003 and began receiving compensation benefits for wage loss on June 29, 2003.

An MRI of the lumbar spine was performed on June 10, 2003. The MRI showed mild degenerative disc disease with mildly bulging disc at the L5-S1 level.

Electrodiagnostic studies were performed on November 10, 2003. Results were a mild right peroneal compression at the fibular head, which "may be due to repeated or prolonged squatting." The nerve conduction study found some evidence of a left L5 root or plexus dysfunction without denervation. "This is a somewhat 'soft' finding, and is not confirmed on EMG-Needle examination."

The claimant returned to work in a light duty, clerical job on November 10, 2003. He was held off work effective

November 26, 2003 due to "increased complaints" as stated by Dr. D. Brooke Miller, Family Practitioner. The District Office accepted a recurrence of disability and began paying the claimant for wage loss.

A Functional Capacity Evaluation performed on April 20, 2004 found the claimant capable of working light duty with a 20-pound maximal lifting recommendation, able to function "at a sedentary or light duty level if he can alternate positions at will."

The District Office advised the claimant he was being referred out for a second opinion examination on April 8, 2004.

Dr. Miller referred the claimant to Dr. Kimberly Salanta of Winchester Musculoskeletal Medicine. Dr. Salanta examined the claimant on May 26, 2004 and diagnosed mechanical low back pain and paresthesias. Dr. Salanta stated, "I cannot explain the patient's current symptomatology based on any anatomic abnormality or mechanism of injury from the reported accident(s). The electrodiagnostic findings would not result from the patient's reported injury. Additionally, the patient is demonstrating no progressive neurologic deficient as evidence by loss of reflexes or atrophy." She stated he was cleared for light duty by the FCE. "In the absence of demonstrable neurologic deficits or tissue damage, pain alone is not an indication for additional work restrictions. I advised the patient to continue to be as active as tolerable."

On June 22, 2004 the District Office found an offered clerical position suitable. The duties of this position were assisting with data entry and performing office-type assignments of answering telephone, typing assignments, and filing. This was sedentary work that required no bending, twisting, or lifting and the claimant had "latitude to vary lengths of time spent sitting or standing depending on physical restrictions and physical needs/comfort. The claimant was advised that he had thirty days to accept the position or provide a written explanation as to why he was not accepting the position within thirty days of the date of that letter.

On June 23, 2004 Dr. Gabriella Szatmary of Winchester Neurological Consultants found a normal neurological

examination, "specifically he was able to walk on his toes, heels and squat without evidence of paresis."

The claimant declined the position on July 16, 2004 (his letter was received in the District Office on July 19, 2004). He stated he still had chronic pain and the only method successful in lessening the pain was daily physical therapy exercises coupled with "consistent changes in light activity." He stated, "The alternative work assignment does not allow for changes in activity, only changes in position."

Another medical report from Dr. Salanta was received on July 19, 2004 (this report was dated July 14, 2004). Dr. Salanta stated, ". . . the patient's condition is somewhat complicated by the presence of abnormalities on his MRI, which do not correlate completely with the abnormalities found on his electrodiagnostic study nor is the electrodiagnostic study consistent with the mechanism of injury. The patient's examination remains normal. There is no evidence of denervation clinically or on EMG. I cannot explain his degree of pain based on clinical findings." Dr. Salanta stated the claimant could perform work at the sedentary level with changes in activity from sitting to standing every one or two hours.

The second opinion report from Dr. Hughes was received. This report was dated June 30, 2004. Dr. Hughes reviewed the records and performed a physical examination. He provided an accurate history of the injury. His diagnosis was lumbar strain, remote, resolved; mild peroneal neuropraxia and symptom magnification. Dr. Hughes opined the claimant "is not temporarily totally disabled or partially disabled due to the injury sustained on 5/09/2002. The patient does not continue to suffer residuals relative to the 05/09/2003 injury; indeed the symptoms are functional or nonorganic in nature. He is capable of performing the duties of a maintenance mechanic since there are no limitations based on his medical condition. Additionally, based on the examination there are no permanent restrictions determined due to the 05/09/2003 injury."

The District Office found, on July 26, 2004, that the claimant had refused suitable employment and terminated benefits under 5 U.S.C. 8106 (c) which provides that a "partially disabled employee who refuses suitable work is

not entitled to wage loss and schedule award compensation." The Office found the claimant had failed to provide any information as to why he could not accept the offered position.

The claimant disagreed with this decision and, through his attorney, Paul Felser, requested an oral hearing.

On August 2, 2004 the District Office issued a letter to the claimant stating that his response as to why he could not assume the offered position did not arrive until after the issuance of the Office's July 26, 2004 decision. The Office also advised the claimant that Dr. Hughes had opined he was no longer suffering residuals of the employment injury.

The claimant resigned his position effective August 5, 2004.

An Office of Workers' Compensation Programs' Hearing Representative set the office decision aside on May 2, 2005. The Hearing Representative found the claimant's response to the suitability decision had been received in the Office prior to the issuance of the termination notice. The Hearing Representative found that since this response was not considered in the decision, the claimant had not been given due process prior to terminating his benefits. He stated, "Normally, upon return of the case to the district office the first step would be to determine whether or not the offered position remained available prior to advising the claimant that he had 15 days to accept the job or face termination of his benefits. However, the medical evidence in this case - namely, the reports from Drs. Salata and Dr. Hughes - clearly indicate that this claimant is no longer suffering from any residuals of his May 9, 2003 injury. The proper course of action in this case will be to issue a decision terminating all benefits on the basis that the claimant has recovered from his injury." The decision of July 26, 2004 was set aside and the case was remanded to the District Office for a de novo decision.

On April 25, 2005 the District Office issued a decision terminating all benefits finding Dr. Hughes' report carried the weight of the medical evidence and established the claimant had no continuing employment related disability.

I find, however, that this action was premature. The Office's procedures for terminating compensation based upon refusal to accept a suitable job differ from the procedures concerning termination of benefits for no continuing disability. Once the Hearing Representative set aside the July 26, 2004 decision, the Office should have reinstated compensation benefits. The Office's Procedure Manual, Chapter 2-1400-7, states that a pre-termination notice is required "in all cases where benefits are being paid in the periodic roll." Once benefits were reinstated, the Office should have issued a pre-termination notice and afforded the claimant due process of 30 days to respond to this notice. The claimant should have been provided an opportunity to respond to the decision that he had no remaining disability, as opposed to the prior decision that he was able to perform sedentary work. These are two distinctly separate matters. Dr. Hughes' report was not received in the Office by the date of the July 26 decision and was not mentioned or considered in that decision. The claimant was never formally advised of Dr. Hughes' findings of no disability, upon which the termination was based, and provided an opportunity to respond.

Compensation benefits constitute a property interest that are protected by the due process clause. The Supreme Court has held that the essential requirements of due process are "notice and opportunity to be heard." These essential due process principles require that an employee have "at least notice and an opportunity to respond in some manner" before termination of compensation benefits.¹


I find that the District Office improperly terminated benefits in this case. The claimant was not afforded due process by being advised at least 30 days in advance of the termination and given a chance to respond to the proposed termination. Therefore, the Office's decision of April 25, 2006 is being SET ASIDE. The Office should reinstate benefits back to the date of termination. The Office should issue a proposed notice of termination. After doing so,

¹ Felix Voyles, 46 ECAB ____ (Docket No. 94-186, issued July 20, 1995).

the Office should consider any new evidence that is received within 30 days of the date of that notice and issue a *de novo* decision concerning the claimant's entitlement to continuing compensation benefits. The case is hereby REMANDED to the District Office for the reasons set forth above.

DATED: OCT 3 2006

WASHINGTON, D.C.


DEBRA W. HARVEY
Hearing Representative

For
Director, Office of Workers'
Compensation Programs