United States Department of Labor
Employees' Compensation Appeals Board

R.C., Appellant	)	
and	)	**Docket No. 08-1641**
	)	**Issued: January 12, 2009**
U.S. POSTAL SERVICE, CANARSIS STATION, Brooklyn, NY, Employer	)	

Appearances:
Ron Watson, for the appellant
No appearance, for the Director

Oral Argument December 4, 2008

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 20, 2008 appellant, through his representative, filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated April 9, 2008 terminating his wage-loss and medical benefits compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly terminated appellant's wage-loss compensation and medical benefits effective April 9, 2008 on the grounds that he no longer had any residuals or disability due to his accepted employment injury.

FACTUAL HISTORY

On December 11, 2005 appellant, then a 53-year-old letter carrier, filed an occupational disease claim alleging that on April 7, 2005 he first became aware of his tarsal tunnel syndrome. On December 8, 2005 he first realized this condition was employment related. The Office accepted the claim for bilateral tarsal tunnel syndrome on April 3, 2006 and authorized right

tarsal tunnel release surgery, which occurred on May 4, 2006. By letter dated June 1, 2006, the Office placed appellant on the periodic rolls for temporary total disability.[1]

In a report dated November 30, 2006, Dr. Jennifer Winnell, a second opinion Board-certified orthopedic surgeon, opined that appellant was totally disabled from his usual job as a letter carrier but could perform work that did not require prolonged walking or standing. She also found that appellant continued to have residuals from his accepted bilateral tarsal tunnel syndrome based upon a physical examination and review of the medical evidence.

In a letter dated April 10, 2007, the Office acknowledged receipt of an April 2, 2007 investigative memorandum and that it had forwarded to the claims examiner. It advised the employing establishment that a copy of the report would be given to appellant upon his request.

In a May 21, 2007 work capacity evaluation (Form OWCP-5), Dr. Charles M. Lombardi, a treating podiatrist, concluded that appellant was permanently totally disabled from his usual job due to his bilateral tarsal tunnel condition. He indicated that appellant was capable of only working a sedentary position.

On June 14, 2007 the Office referred appellant to Dr. Robert Israel, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report June 22, 2007, Dr. Israel diagnosed bilateral tarsal tunnel syndrome. He advised that appellant had residuals that precluded standing for prolonged periods and found appellant disabled from performing his usual employment duties due to his accepted condition. Dr. Israel opined that appellant was capable of performing sedentary work with walking and standing of no more than one to two hours a day.

In a September 5, 2007 supplemental report, Dr. Israel reviewed a surveillance videotape and stated that on November 3, 2006 at 4:48 appellant appeared to be walking normally and climbing stairs in front of his house. On November 16, 2006 at 10:35 he was walking normally, bending and lifting garbage and climbing stairs. On November 28, 2006 appellant again put out the garbage and got into a car. On January 19, 2007 he was seen walking up stairs and entering a house. Based upon a review of the surveillance videotape, Dr. Israel opined that the activities he observed appellant performing were inconsistent with tarsal tunnel syndrome. From this material, he concluded that appellant was capable of performing his usual work duties and required no further medical treatment for his tarsal tunnel syndrome.

On January 9, 2008 the Office issued a notice of proposed termination of compensation. It found that the supplemental report of Dr. Israel represented the weight of medical opinion and established that appellant had no residuals of his accepted condition.

By letter dated January 24, 2008, appellant's representative requested the Office to provide appellant copies of all surveillance materials as was relied upon by Dr. Israel.

In a February 20, 2008 memorandum of telephone call, an Office claims examiner noted that while appellant was entitled to get a copy of a surveillance videotape his representative

[1] Appellant elected to receive retirement benefits from the Office of Personnel Management effective April 1, 2007.

could not request the copy for appellant. The Office noted that appellant's representative had been informed of this by a telephone call and that a letter would be sent to his representative confirming this policy. The record contains no copy of any letter being sent to appellant's representative informing him that only appellant could request a copy of the surveillance videotape.

By decision dated April 9, 2008, the Office finalized the termination of appellant's compensation benefits effective that date.

LEGAL PRECEDENT

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.[2] The Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[3] The burden of proof on the Office includes the necessity of furnishing rationalized medical opinion evidence which is based on a proper factual and medical history.[4]

A claimant may authorize an individual to represent him in any proceeding before the Office.[5] A properly appointed representative who is recognized by the Office may make a request or give direction to the Office regarding the claims process, including a hearing.[6] The authority includes presenting or eliciting evidence, making arguments of facts or the law and obtaining information from the case file, to the same extent as the claimant.[7]

The Board has held that, in certain circumstances, videotape evidence may be of value to a physician offering an opinion regarding a claimant's medical condition. It may reflect on the patient's reliability as a historian or on the actual ranges of motion, lifting or other physical activities the claimant may perform. However, a videotape may be incorrect or misleading to a physician if there are errors, such as the identity of the individual recorded on the videotape or whether certain activities were facilitated by the use of medication. The Office has the responsibility to make the claimant aware that it is providing videotape evidence to a medical expert. If the claimant requests a copy of the videotape, one should be made available and the employee given a reasonable opportunity to offer any comment or explanation regarding the accuracy of the recording.[8]

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[2] *A.W.*, 59 ECAB ___ (Docket No. 08-306, issued July 1, 2008).

[3] *T.P.*, 58 ECAB ___ (Docket No. 07-60, issued May 10, 2007); *David W. Pickett*, 54 ECAB 272 (2002); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[4] *Daniel F. O'Donnell, Jr.*, 54 ECAB 456 (2003); *Gewin C. Hawkins*, 52 ECAB 242 (2001).

[5] 5 U.S.C. § 8127(a).

[6] 20 C.F.R. § 10.700(c).

[7] *Id.*

[8] *J.M.*, 58 ECAB ___ (Docket No. 06-661, issued April 25, 2007).

ANALYSIS

The Office terminated appellant's compensation benefits effective April 9, 2008 based on the September 5, 2007 supplement report by Dr. Israel, a Board-certified orthopedic surgeon and second opinion physician, who reported that he viewed a surveillance videotape of appellant and described four instances of appellant walking normally about his house. Based on the surveillance tape, appellant was found capable of returning to full-time work with no restrictions or limitations. Dr. Israel concluded that appellant was capable of performing his date-of-injury job as a letter carrier and had no disability or physical restrictions based on the surveillance video.

The Board notes that appellant's representative requested that a copy of the surveillance videotape be sent to appellant in a January 24, 2008 letter. However, the Office failed to provide the surveillance videotape as requested. The Office did not respond in writing to the January 24, 2008 request by appellant's representative. On February 20, 2008 the Office advised by telephone that, although appellant could request a copy of the videotape, his representative could not request it on his behalf. The record establishes that appellant and his representative were not provided with the videotape. Thus, neither appellant nor his representative had the opportunity to respond or offer comment concerning the accuracy of the recording. The Board finds that this is contrary to the Office's regulations, which state that a properly appointed representative who is recognized by the Office may obtain information from the case file to the same extent as the claimant.[9] The failure of the Office to provide a copy of the surveillance videotape to appellant precluded him from verifying that he was, in fact, the individual recorded. Neither appellant nor his duly authorized representative had the opportunity to inspect the videotape or comment upon the accuracy of the recording prior to the termination of benefits. For this reason, the Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits. On remand, the Office shall provide appellant with a copy of the surveillance videotape, as requested.

CONCLUSION

The Board finds that the Office improperly terminated appellant's compensation for wage-loss and medical benefits effective April 9, 2008

[9] 20 C.F.R. § 10.700(c); *see also Travis L. Chambers*, 54 ECAB 533 (2003).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 9, 2008 is reversed.

Issued: January 12, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge, concurring:

I join in the decision of the majority. Under section 8127 of the Federal Employees' Compensation Act a claimant may authorize an attorney or other individual to represent his or her interests in any proceeding before the Office.[1] The record reflects that as of March 28, 2006 appellant authorized his representation and the release of information to Bruce H. Didriksen, with the National Association of Letter Carriers, or his designee. As noted by the majority, on January 24, 2008, Mr. Didriksen requested that the Office provide the claimant with a copy of all surveillance materials. He noted that appellant had been given a preliminary notice of termination of benefits and requested the opportunity for appellant to review the surveillance materials prior to the submission of any response. The Office was requested to forward the materials to appellant at his home address. It is clear that appellant had provided the Office with a signed written statement of authorization as required.[2] Moreover, appellant's authorization of a union representative was not precluded.[3] However, having been advised of his representation,

[1] 5 U.S.C. § 8127(a). *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fees for Representatives' Services*, Chapter 2.1200.2.a (May 2005).

[2] 20 C.F.R. § 10.700(a).

[3] *Id*. at § 10.701(b).

the Office failed to comply with the provisions of its implementing federal regulations concerning obtaining information from the case record.[4]

Moreover, accepting that the identity of appellant on the videotape may be established by the review of Dr. Israel, his September 5, 2007 report provides only a brief recitation of certain walking, lifting and climbing activities recorded on four dates. Appellant was described as walking about his home, lifting and dumping garbage and climbing stairs. Dr. Israel does not explain how any activities observed depart from the limitation of one to two hours of standing, walking, lifting or squatting allowed for in his June 22, 2007 report. Dr. Israel does not make clear how appellant's walking on foot departed from what was previously observed on examination or how his gait, step or weight bearing as observed on surveillance were otherwise inconsistent with the accepted condition of tarsal tunnel syndrome.

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

[4] In *Travis L. Chambers*, 54 ECAB 533 (2003), *petition for recon. granted (denying reversal of prior decision)*, 55 ECAB 138 (2003), the Board found that appellant was prejudiced when the Office failed to send his representative a letter notifying of the suspension of benefits in 30 days if he failed to cooperate with rehabilitation efforts. On reconsideration, the Board rejected the Director's argument that notification to the employee was sufficient notification to his attorney and found the decision suspending benefits was not properly issued. In *James D. Langteau*, 53 ECAB 428 (2002), the Board remanded the case to the Branch of Hearings and Review after the Office neglected to mail notice of a scheduled hearing to appellant's authorized representative. In *Katherine E. Crews*, 53 ECAB 421 (2002), the Board held that the Office's finalization of an overpayment was improper as the preliminary notice was not sent to appellant's attorney.