United States Department of Labor
Employees' Compensation Appeals Board

H.C., Appellant	)	
and	)	**Docket No. 11-627**
	)	**Issued: July 5, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Pensacola, FL, Employer	)	

Appearances:
Appellant, pro se
No appearance, for the Director

Oral Argument August 3, 2011

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 11, 2011 appellant filed a timely appeal from a July 26, 2010 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration. He further appeals November 4 and 30, 2010 nonmerit decisions denying his requests for reconsideration as untimely filed and insufficient to establish clear evidence of error. As the last merit decision was issued September 29, 2009, more than 180 days before the filing of this appeal,[1] pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether OWCP properly denied appellant's request to reopen his case for further review of the merits under 5 U.S.C. § 8128(a); and (2) whether OWCP, in its

[1] 20 C.F.R. §§ 501.2(c) and 501.3.

[2] 5 U.S.C. § 8101 *et seq.*

November 4 and 30, 2010 decisions, properly denied his requests for reconsideration as they were untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This case has previously been before the Board. In decisions dated September 30, 1992, September 1, 1994, January 26, 1999 and June 1, 2001, the Board affirmed OWCP's finding that appellant had no disability after June 30, 1991 causally related to his June 8, 1987 work injury.[3] The facts and the circumstances surrounding the prior decisions are hereby incorporated by reference.

On July 10, 2002 OWCP vacated its prior determination that appellant had no disability after June 30, 1991 and found that he was entitled to medical and compensation benefits retroactive to July 1, 1991. In a decision dated November 7, 2003, however, it terminated his compensation for refusing suitable work. By decision dated December 18, 2006, OWCP vacated its November 7, 2003 decision after finding that it had not considered all of appellant's medical conditions prior to terminating his compensation.

On April 30, 2009 Dr. Rodger K. Garrett, an attending specialist in pain management, related that, based on numerous office visits and his review of a surveillance video provided by the employing establishment, appellant could work full time with restrictions against lifting over 25 pounds. He reviewed an April 30, 2009 job offer from the employing establishment and indicated that appellant could perform the duties of the position. Dr. Garrett further completed a work restriction evaluation and found that he could work full time in his usual employment modified to reflect that he could not lift over 25 pounds. In an April 30, 2009 memorandum of interview, an employing establishment investigator related that Dr. Garrett reviewed edited video surveillance of appellant "playing an organ and piano during three separate church services, sitting for extended amounts of time and walking without appearing to be in any pain or discomfort." Dr. Garrett opined that appellant's actions were inconsistent with "the manner in which he presents himself during office visits" and showed that he could return to limited-duty work. He noted that it would be difficult to play the piano with his medical condition. On May 12, 2009 Dr. Garrett indicated that he had reviewed surveillance video showing appellant performing activities inconsistent with the history he provided. He discharged him from care due to credibility issues.

By decision dated August 18, 2009, OWCP terminated appellant's compensation for refusing suitable work. It based the termination on Dr. Garrett's finding that he could perform the duties of an April 30, 2009 job offer.

On August 31, 2009 appellant requested reconsideration. He argued that Dr. Garrett did not perform a complete physical examination. Appellant submitted an August 12, 2009 report from Dr. Garrett in support of his contention. Dr. Garrett related that he had treated appellant

[3] Docket Nos. 92-249, 93-2409, 97-2508, 01-241, respectively. OWCP accepted that on June 8, 1987 appellant sustained an aggravation of right inguinal hernia surgery and peripheral ilioinguinal and iliohypogastric nerve entrapment.

since January 2009. He discharged him from care after a limited physical examination with lifting restrictions up to 25 pounds.

In a decision dated September 29, 2009, OWCP denied modification of its August 18, 2009 decision.

Appellant requested reconsideration on November 12, 2009. He argued that Dr. Garrett's opinion was speculative. In a nonmerit decision dated November 24, 2009, OWCP denied his request to reopen his case for further merit review.

On January 24, 2010 appellant requested reconsideration. He contended that Dr. Garrett was not his attending physician as he only saw him twice. Appellant also submitted additional medical evidence and argued that it showed that he was unable to work due to narcotic medication. On December 10, 2009 Dr. David E. Fairleigh, a Board-certified anesthesiologist, noted that appellant had a "history of chronic intractable inguinal pain" and that he "relates that he is disabled." He indicated that he would "defer any functional limitations" to his attending physician and that he was "only here to help manage his medications at this time." Dr. Fairleigh prescribed medication that could result in sedation and cognitive impairment and asserted that appellant should avoid machinery and driving if he experienced such effects. On February 5, 2010 he diagnosed intractable right inguinal pain and reiterated that he should not drive or operate machinery if he experienced side effects from the pain medication.

In a nonmerit decision dated July 26, 2010, OWCP denied reopening appellant's case for further merit review under 5 U.S.C. § 8128.

On October 4, 2010 appellant requested reconsideration, again arguing that Dr. Garrett was not his attending physician and that pain medication interfered with his ability to work.

In a decision dated November 4, 2010, OWCP denied his request for reconsideration as it was untimely filed and insufficient to show clear evidence of error.

On November 19, 2010 appellant requested reconsideration. He related that in civil court Dr. Garrett testified that he saw appellant move a piano bench on the surveillance video. Appellant alleged that this contradicted his statement that he saw him on the video playing an organ and sitting for long periods. He submitted an October 11, 2010 judgment from a county court judge denying his claim for damages against Dr. Garrett. The judge related that Dr. Garrett testified that appellant could return to work based on his review of a surveillance video which showed him sitting for long periods and moving a piano bench and also on his review of medical records and clinical evaluation.

By decision dated November 30, 2010, OWCP denied his request for reconsideration as untimely filed and insufficient to demonstrate clear evidence of error.

On appeal appellant notes that he sued Dr. Garrett in civil court for providing a false medical report to OWCP. He argues that Dr. Garrett told the county court judge that appellant could return to work because he lifted a piano bench. Appellant maintains that he did not lift a piano bench and notes that the judge refused to review the surveillance video. He also argues

that Dr. Garrett was not his attending physician and that he only treated him on March 12 and May 12, 2009.

LEGAL PRECEDENT -- ISSUE 1

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,[4] OWCP's regulations provide that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.[5] To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[6] When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.[7]

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[8] The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[9]

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained an aggravation of right inguinal hernia surgery and peripheral ilioinguinal and iliohypogastric nerve entrapment due to a June 8, 1987 employment injury. In a decision dated August 18, 2009, OWCP terminated his compensation on the grounds that he refused an offer of suitable work. On September 29, 2009 it denied modification of its August 18, 2009 decision and, in a November 24, 2009 nonmerit decision, OWCP denied his request to reopen his case for further merit review under section 8128. Appellant again requested reconsideration on January 24, 2010.

As noted above, the Board does not have jurisdiction over the last merit decision issued by OWCP on September 29, 2009. The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2) in his January 24, 2010 request for reconsideration, requiring OWCP to reopen the case for review of the merits of the claim. In his request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. He did not identify a specific point of law or show that it was

[4] 5 U.S.C. §§ 8101-8193. Section 8128(a) of FECA provides that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application."

[5] 20 C.F.R. § 10.606(b)(2).

[6] *Id.* at § 10.607(a).

[7] *Id.* at § 10.608(b).

[8] *F.R.*, 58 ECAB 607 (2007); *Arlesa Gibbs*, 53 ECAB 204 (2001).

[9] *P.C.*, 58 ECAB 405 (2007); *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

erroneously applied or interpreted. Appellant did not advance a new and relevant legal argument. He argued that Dr. Garrett was not his attending physician as he had only treated him on two occasions. The record reveals, however, that Dr. Garrett examined appellant at least on December 14, 2008 and January 15, March 12, April 13 and May 12, 2009.

Appellant also argued that the medical evidence established that he was unable to work due to pain medication. In reports dated December 10, 2009 and February 5, 2010, Dr. Fairleigh diagnosed intractable right inguinal pain. He noted that appellant related that he was disabled. Dr. Fairleigh, however, deferred any disability finding to his attending physician and indicated that he was only managing appellant's pain. While he found that appellant may not be able to drive or operate machinery due to effects of his pain medication, Dr. Fairleigh did not address the relevant issue of whether he had the capacity to perform the duties of the April 30, 2009 position offered by the employing establishment. Evidence that does not address the particular issue involved does not warrant reopening a case for merit review.[10]

The dissent suggests that OWCP erred in relying on the opinion of Dr. Garrett in the termination of appellant's compensation benefits. The record contains the May 12, 2009 treatment report of Dr. Garrett pertaining to appellant's pain management clinic visit that day. Dr. Garrett stated:

> "[Appellant] is here for refill of medications and followup. [He] reports his pain score to be 8/10, consistent with his previously reported pain scores of 8/10 on his last several visits. [Appellant] is seen on a monthly basis. He states no changes since his last visit. [Appellant] states he is taking medication as prescribed and they are providing adequate relief. He states he is having problems sleeping on his stomach and he is complaining of groin pain. [Appellant's] last urinalysis was from April 13, 2009. It shows positive levels for hydrocodine and hydromorphone.
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> "Of significance is that the clinic was visited by Federal Investigators of United States Postal Service since [appellant's] last clinic visit. They have in possession and displayed video surveillance taken personally of them showing [appellant] in a variety of activities that were inconsistent with the story that he shows with us at this clinic visit as well as they relay historical information that can be interpreted that [appellant] is consistently avoiding return to work despite the video surveillance that demonstrated the ability to return to work despite the patient's claim.
>
> "Review of systems and physical exam[ination] as per tick sheet. [Appellant] is very well groomed and dressed today as he was when I saw him last on March 12, 2009.
>
> "Assessment: [Appellant] has been the patient with this clinic since at least August 2002. He carried the diagnoses of ilioinguinal neuritis and iliohypogastric

[10] *J.P.*, 58 ECAB 289 (2007); *Freddie Mosley*, 54 ECAB 255 (2002).

neuritis secondary to a surgery from a hernia repair several years ago with the patient complaining of residual pain from that. I do not believe that [appellant's] level of pain necessarily [warrants] the level of care provided by the Specialty Pain Clinic nor am I comfortable continuing with his care due to question of credibility of the patient's reported pain patterns and level of pain not being consistent with video surveillance that has been shared with me. I believe the clinic's time and my time will be reserved for patients who are difficult to treat and require more complicated and comprehensive treatment plans other than just long-term dosing of simple pain medication that can be handled by a family practitioner or other primary care provider.

"Plan: I discussed this with the patient. I explained to him the reasons why I no longer feel comfortable continuing his care.… I advised him to return to his reported primary care physician…."

In *J.M.*,[11] the Board found that OWCP met its burden of proof to terminate the employee's compensation benefits for her accepted right arm and wrist conditions. Based on a conflict in medical opinion, the employee was referred for examination by an impartial medical specialist on whether the accepted conditions had resolved and the nature of any continuing disability. The impartial medical specialist examined her and reviewed a surveillance videotape. He found that the employee had the capacity to perform the duties as a postal clerk expediter without restriction based on his findings on physical examination and vague nature of her complaints. In addressing the videotape surveillance, the Board noted:

"Under 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. [OWCP] 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."[12]

During the examination of May 12, 2009, appellant never contested the accuracy of the videotape after being apprised of it in discussion with Dr. Garrett.[13] There is no question in this case as to any mistake of identity, as the physician verified observing appellant perform a variety of activities that were inconsistent with what he told the clinicians at the pain clinic. Dr. Garrett

[11] 58 ECAB 478 (2007).

[12] *Id*. at 486.

[13] In his January 24, 2010 reconsideration request, appellant noted that he had obtained a copy of the surveillance videotape and had shown it to several subsequent examining physicians.

found that appellant's credibility on his reported pain pattern and level of pain was not consistent with the videotape observation. In a separate letter of May 12, 2009, Dr. Garrett apprised appellant of his discharge from treatment at the clinic within 30 days based on noncompliance with medical treatment and potential drug-seeking behavior or use of the physician's office services to obtain prescriptions of controlled substances under false pretenses.

The dissent acknowledges that appellant has failed to meet the requirements for a merit review: to wit, he failed to articulate an erroneous point of law; he did not advance a relevant legal argument not previously considered by OWCP and he submitted no new evidence. Rather, the dissent advances a new legal standard departing from 20 C.F.R. § 10.606: "The evidence to justify a merit review of appellant's claim was held by and known to [OWCP] before any reconsideration request was filed. It was waiting to be identified and considered and was not new in the sense of subsequently arising."

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or submit relevant and pertinent new evidence not previously considered. Pursuant to the applicable federal regulations, OWCP properly denied merit review.

LEGAL PRECEDENT -- ISSUE 2

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.[14] As once such limitations, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of OWCP's decision for which review is sought. OWCP will consider an untimely application only if the application demonstrates clear evidence on the part of OWCP in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.[15]

The term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to OWCP's denial, would have created a conflict in medical opinion requiring further development, is not enough to show clear evidence of error and would not require a review of the case on OWCP's Director's own motion.[16] To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided

[14] 5 U.S.C. §§ 8101-8193.

[15] 20 C.F.R. § 10.607.

[16] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (February 2003).

by OWCP. The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.[17]

ANALYSIS -- ISSUE 2

OWCP properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of its original decision.[18] A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.[19] As appellant's October 4 and November 19, 2010 requests for reconsideration were submitted more than one year after the last merit decision of record, they were untimely. Consequently, he must demonstrate clear evidence of error by OWCP in denying his claim for compensation.[20]

In his October 4, 2010 request for reconsideration, appellant again contended that Dr. Garrett was not his attending physician. As discussed above, OWCP addressed this argument and found that the physician had examined him on multiple occasions. Consequently, appellant's argument is insufficient to demonstrate clear evidence of error.

Appellant further argued that his need for pain medication interfered with his ability to work. The relevant issue, however, is whether he had the capacity to perform the duties of the position offered by the employing establishment. That is a medical issue which must be addressed by relevant medical evidence.[21]

In his November 19, 2010 request for reconsideration, appellant related that in civil court Dr. Garrett testified that he witnessed him moving a piano bench on the surveillance video. He maintained that his testimony contradicted his statement that he witnessed him sitting and playing the organ on the surveillance video. In an October 11, 2010 judgment from county clerk, a judge indicated that Dr. Garrett testified that he based his opinion that appellant could return to work on his review of medical records, clinical evaluation and the review of surveillance video which showed him sitting for long periods and moving a piano bench. The term "clear evidence of error" is intended to represent a difficult standard. It is not enough to merely show that the evidence could be construed to produce a different conclusion.[22] Consequently, even if Dr. Garrett did not witness appellant move a piano bench, this alone would not constitute clear evidence of error by OWCP as it is not the type of positive, precise and explicit evidence that

[17] *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

[18] 20 C.F.R. § 10.607(a).

[19] *See Robert F. Stone*, *supra* note 18.

[20] 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

[21] *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

[22] *See T.D.*, Docket No. 10-1679 (issued April 15, 2011).

manifests on its face that OWCP committed any error in terminating appellant's compensation for refusing suitable work.[23]

On appeal appellant argues that Dr. Garrett did not witness him move a piano bench on the surveillance video. He also maintains that he was not his attending physician. As discussed, however, appellant's arguments do not demonstrate clear evidence of error. In order to establish clear evidence of error, the evidence submitted must raise a substantial question as to the correctness of the Office's decision.[24] The evidence appellant submitted on reconsideration fails to meet this standard.

CONCLUSION

The Board finds that OWCP properly denied appellant's request to reopen his case for further review of the merits under 5 U.S.C. § 8128. The Board further finds that OWCP, in its November 4 and 30, 2010 decisions, properly denied his requests for reconsideration as they were untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the November 30, November 4 and July 26, 2010 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 5, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[23] *See D.D.*, 58 ECAB 206 (2006).

[24] *See Veletta C. Coleman*, 48 ECAB 765 (1993).

James A. Haynes, Alternate Judge, Dissenting:

I respectfully dissent from the decision of my colleagues. With regard to the appeal of OWCP's decision dated July 26, 2010, I would find that appellant met his burden to show that OWCP erroneously applied or interpreted a point of law in its prior decision which terminated his monetary benefits for refusing suitable work.[1] The Board has before it two other nonmerit decisions. The Board does not have merit jurisdiction over the termination itself, but I would grant appellant a merit review of his claim.[2] I adopt the jurisdiction statement in the majority opinion and I have no dispute with the factual history or legal precedent as presented.

I acknowledge that appellant did not specifically identify the error of law which I find.[3] Appellant, like many injured employees, is not an attorney and should not be held to an attorney's standard of knowledge and skill. The evidence to justify a merit review of appellant's claim was held by and known to OWCP before any reconsideration request was filed. It was waiting to be identified and considered and was not new in the sense of subsequently arising.

It is enough that appellant argued in his reconsideration request dated January 24, 2010 that Dr. Garrett was not his treating physician and that Dr. Garrett's opinion regarding appellant's work restrictions was not supported by the facts or rationalized. He offered more detail and noted that Dr. Garrett had performed only a limited physical examination and argued that only a complete physical would have justified the medical opinion offered.[4] Appellant vigorously asserted his right to request reconsideration and made the best he could of his case. I would find appellant failed to articulate a legal argument although there is one to be made and that he did not meet the second test for obtaining merit review. I would also find that there was no new evidence appellant could have provided and that appellant failed to satisfy the third test for obtaining merit review.

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[1] OWCP's order on which I would grant merit review is discussed as issue 1 in the majority opinion. Under 20 C.F.R. § 10.606, appellant must submit a request a reconsideration and meet one of three criteria to obtain merit review of OWCP's decision:

(a) Show that OWCP erroneously applied or interpreted a point of law.

(b) Advance a relevant legal argument not previously considered by OWCP.

(c) Constitute relevant and pertinent new evidence not previously considered by OWCP.

[2] The other two decisions are identified in the jurisdiction portion of the majority opinion and are not relevant to this dissent because the result of setting aside OWCP's denial of merit review in any of the three orders would be the same.

[3] I take into account that appellant may not have known all the facts regarding this case. Given that the investigation conducted by the special agents involved covert surveillance and that the interview with Dr. Garrett may not have been fully disclosed, appellant may be excused for clumsy reconsideration requests.

[4] OWCP case record: "Requesting for Reconsideration" from appellant to Mrs. Hernandez, 3 pages, dated January 24, 2010 (appellant uses year "2910" which I presume is a typo). Where an appellant asserts that OWCP erroneously applied or interpreted a point of law, the form of the request may vary considerably and the Board has looked to whether OWCP actually made a legal error. *C.C.*, Docket No. 10-1442 (issued February 10, 2011).

My opinion is based on the occurrence of three events in this claim which, taken together, require review. In brief, the three events are:

> (1) The employing establishment contacted appellant's treating physician in person and in violation of the regulations which govern monitoring of an employee's medical care.[5] While some contacts may be inadvertent and insignificant, any violation of this regulation should be a concern for OWCP and the Board.
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> (2) The employing establishment's contact with Roger Garrett, M.D. was of an intrusive and prejudicial nature such as to undermine the probative value of Dr. Garrett's medical opinion. That opinion ceased to be the unbiased judgment of a treating physician and became an opinion procured by the employing establishment and adopted by OWCP.
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> (3) OWCP failed to follow Board precedent and notify appellant that it (and the employing establishment) intended to provide investigative surveillance to a physician who would then be asked to offer an opinion relevant to appellant's claim. It is directed to offer appellant the chance to request a copy of the surveillance and to comment on it.[6] Appellant was denied an important opportunity to note and correct any errors in the investigation.

The posture of this case may be best understood by working backwards, appellant's benefits were terminated by OWCP order dated August 18, 2009. The stated reason for termination was that appellant had refused suitable work offered by the employing establishment.

On April 30, 2009 Dr. Garrett was visited at his office by two special agents of the U.S. Postal Service, Office of the Inspector General.[7] According to the agents' memorandum of activity, dated April 30, 2009 they had the doctor view "still photos and composite segments of edited video surveillance of [appellant] playing an organ and a piano during three separate church services." The Memorandum of Interview does not disclose the dates on which the video was taken, the duration of the video as displayed to the doctor, or how the video was edited for presentation. There is no mention of any evidence beyond the photograph and video product of their surveillance. It is impossible, in retrospect, to know exactly what the doctor saw.

[5] 20 C.F.R. § 10.506. The prohibition on personal or telephone contacts with an employee's treating physician by the employing establishment is identical today with that in effect in 2008. It has been referenced in a single Board opinion but was not considered in the disposition of the appeal. *D.S.*, Docket No. 07-2258 (issued June 5, 2008).

[6] *J.M.*, 58 ECAB 478 (2007); *Frederick Nightingale*, 6 ECAB 268 (1953).

[7] The record contains several memoranda which outline the conduct of the investigation. The contact with Dr. Garrett is described in an April 30, 2009, Memorandum of Interview, prepared by Special Agent Tracy Johnson on May 5, 2009. This document is the sole source for the discussion of the interview which follows in this opinion.

Dr. Garrett initialed the job offer letter, also dated April 30, 2009, and changed the 20-pound lifting restriction to 25 pounds without other comment.[8] He wrote a brief statement in longhand on a postal service form called a "Sworn Statement" that "based on current available information" appellant could work with a 25-pound lifting restriction but not do consistent "manual labor." The form was signed by Dr. Garrett at 2:00 p.m. and by one of the agents at 2:20 p.m., April 30, 2009.[9] Dr. Garrett did not identify any information from appellant's chart or describe what he had read or been told about the position of modified mail handler.

On May 12, 2009 Dr. Garrett sent appellant a letter terminating the doctor-patient relationship and offering assistance in finding another physician.[10] There is no reference to surveillance video or the visit by agents from the employing establishment as potential reasons for Dr. Garrett's decision.[11]

On August 12, 2009 Dr. Garrett produced a typed three sentence letter which confirmed a 25-pound lifting restriction and raised the possibility that a functional capacity evaluation might be needed.[12] He characterized his treatment of appellant as "limited physical examination" during clinic visits, between January and May, 2009. The letter of August 12, 2009 did not include a statement that appellant could work as a modified mail handler.

OWCP found that the modified mail handler position was suitable based entirely on the medical opinion of Dr. Garrett and identified him as appellant's treating physician.[13] In the decisions on appeal in this case, OWCP did not cite any other medical evidence or opinion to

[8] The record contains a copy of a letter on U.S. Postal Service stationary from Ethel M. King addressed to appellant and outlining the position. It shows handwritten notations which indicate a 25-pound lifting restriction initialed "RKG April 30, 2009." The letter also bears the handwritten signatures of Dr. Garrett and Jeff Chandler, P.A. both dated April 30, 2009.

[9] OWCP case record: two-page sworn statement of Dr. Garrett dated April 30, 2009 and signed Tracy Johnson, Special Agent.

[10] OWCP case record: Copy of a letter dated May 12, 2009 from Mr. Garrett to appellant.

[11] Appellant later filed an action at law against Dr. Garrett in which the doctor prevailed. This marked the end of Dr. Garrett's active participation in this claim.

[12] OWCP case record: Copy of a single page letter dated August 22, 2009 from Dr. Garrett to "To Whom It May Concern."

[13] A partial list of OWCP decisions which rely upon Dr. Garrett as appellant's "treating physician" includes each decision now before ECAB: July 26, November 4 and 30, 2010 denials of merit review. Other decisions in the case record, but not before us, also identify Dr. Garrett as appellant's treating physician and the work restrictions as being provided by appellant's treating physician.

support its decision on this issue. When appellant refused the job offer, OWCP terminated his benefits.[14]

OWCP has not referenced the regulatory prohibition of direct contacts between the employing establishment and the employee's doctor.[15] Perhaps more significantly, OWCP has never considered the possible prejudice arising from a personal visit by the special agents. During that visit, the employing establishment provided all the evidence. That evidence itself had been edited. Before they left Dr. Garrett's office, the agents obtained a sworn statement from him which modified appellant's lifting restrictions. There is no indication that the agents ever encouraged or allowed Dr. Garrett time to review appellant's chart or obtain other records before offering an opinion.[16] Dr. Garrett apparently did not have an OWCP Statement of Accepted Facts or a package of medical records as he wrote his opinion.

There is no record of what conversation, if any, occurred while the agents interviewed Dr. Garrett. While it is possible that the special agents offered their own commentary about the investigation, it is also possible that they said nothing. This gap in the record need not exist and it results from the employing establishment's failure to follow the prohibition in 20 C.F.R. § 10.506. The question is complicated by the fact that Dr. Garrett may have been influenced by innocent and unintentional actions or remarks by the special agents. His opinion could also have been shaded and directed by a feeling of intimidation during a visit from law enforcement officers.

When the employing establishment obtains critical medical opinions directly, OWCP is forced into a passive role of accepting, rather than generating, evidence. For all the reasons suggested here, the practice by OWCP of accepting evidence obtained through the employing establishment's direct personal contact with employees' physicians should be limited, if not discontinued.[17] OWCP is tasked with developing employee claims and employing establishment participation in the claims process is limited.[18]

Taken on its own merits, Dr. Garrett's opinion falls short of the standard for a complete, detailed, rationalized opinion. A probative physician's report must show that the doctor knew

[14] OWCP decision dated August 18, 2009. While this decision is not before the Board on appeal, it remains in the record and is relevant to the extent that it is clear that the claims examiner and senior claims examiner on the decision quoted extensively from the interview statement of the postal inspector, referenced in footnote 7. This statement is, at best, a layperson's accurate recollection of the oral responses of a physician to questions posed by the special agent and cannot be relied upon as a medical opinion entitled to any evidentiary weight. It is an indication that OWCP sensed the very limited probative value of Dr. Garrett's written statements and proceeded to bolster the record with the special agent's account of the remarks Dr. Garrett made.

[15] 20 C.F.R. § 10.506.

[16] It is not clear what records Dr. Garrett possessed concerning appellant's treatment between 1987 and 2009.

[17] This concern applies with particular force to the termination of benefits for refusal of suitable work. The Board precedent has long held that this penalty provision should be narrowly construed. *Richard Cortes*, 56 ECAB 200 (2004). It is OWCP that must obtain and assess the evidence to apply this provision.

[18] 20 C.F.R. § 10.118.

the patient well, had sufficient knowledge of the proposed employment position and also contain an adequate explanation of why the employee's medical restrictions allow him or her to do the job offered.[19] In this case, appellant has a lengthy history of treatment including surgery.[20]

The record of this case raises four factors which support a finding that OWCP erred when it determined that Dr. Garrett's report could support a finding that a modified mail handler job was suitable employment and justified a termination of appellant's benefits. First, appellant was not notified that OWCP intended to present surveillance video for the purpose of obtaining a physician's opinion about an issue critical to his case. Second, the employing establishment violated applicable regulations by contacting Dr. Garrett directly and in person. Third, the interview with Dr. Garrett was conducted in a manner which destroyed the probative value of any opinions Dr. Garrett provided. Finally, Dr Garrett's reports were not detailed or rationalized on appellant's medical restrictions.[21] It is my opinion that the totality of these factors is sufficient to require a merit review of whether OWCP properly terminated appellant's benefits. It is unnecessary to determine, and this opinion does not attempt to determine, whether a single factor or different combination of factors in a different factual environment also would require a merit review.

Similarly, this opinion does not consider the question of whether this appellant might have met the heavier burden of showing clear evidence of error by OWCP in its termination decision. I find only that appellant has satisfied one of the three tests established in the regulations governing a reconsideration request filed within one year of the decision.[22]

[19] *W.F.*, Docket No. 11-1258 (issued January 23, 2012). This Board's opinion is relevant because it considers a factual situation very similar to the case under consideration. The Board affirmed a termination of monetary benefits because appellant had refused suitable employment. Appellant's treating physicain was contacted by the U.S. Postal Service, Inspector General's office and shown surveillance video. It is unclear in our opinion whether OWCP informed appellant of its intention to use video tape. There is no indication that appellant's counsel objected based upon possible prejudice resulting from agents of the employing establishment personally contacting appellant's treating phsician. Likewise, there is no evidence that she raised the issue of whether she had been afforded the opportunity to preview the video to be shown to her treating physician. However, it is clear that the treating physician in this claim had 10 years of treatment experience with appellant. It is also clear that the treating physician reviewed all his records and provided multiple reports which were detailed and well rationalized concerning appellant's functional capacity.

[20] OWCP case record: Johns Hopkins Hospital operative report dictated August 3, 2006.

[21] *M.L.*, 57 ECAB 746 (2006); *Sharon Dean*, 56 ECAB 175 (2004).

[22] 20 C.F.R. § 10.607(b).

Finally, although this opinion identifies defects in the evidence presented here, it does not offer any new or different rule for the handling of evidence under FECA claims. At most, I suggest that OWCP fell short of the existing standards in this case. The opinion of Dr. Garrett, when adopted by OWCP to determine suitable employment and to terminate benefits, ceased to be the opinion of the appellant's treating physician and become an OWCP opinion. Thus, appellant is correct. Dr. Garrett's opinion was not the opinion of a treating physician. From the time the special agents entered his office, the role of "treating [physician]" was destroyed. OWCP erred in finding otherwise and appellant is entitled to a merit review.

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