United States Department of Labor
Employees' Compensation Appeals Board

F.S., Appellant	)	
and	)	**Docket No. 11-863**
	)	**Issued: September 26, 2012**
U.S. POSTAL SERVICE, PHILADELPHIA PROCESSING & DISTRIBUTION CENTER, Philadelphia, PA, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 18, 2011 appellant, through her attorney, filed a timely appeal of the September 22, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) terminating her compensation benefits. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly terminated appellant's wage-loss compensation and medical benefits effective September 26, 2010 on the grounds that she no longer had any residuals or disability causally related to her accepted employment-related injuries.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on June 25, 2008 appellant, then a 41–year-old mail handler, sustained a right ankle sprain while pushing an all-purpose container filled with mail. Subsequently, it accepted her claim for consequential osteochrondritic desiccans. On May 28 and June 11, 2009 appellant underwent right ankle arthroscopy, debridement of microfracture and open excision of an os trigonum which were performed by Dr. Gene W. Shaffer, an attending Board-certified orthopedic surgeon.

In prescriptions dated April 6 and May 15, 2010, Dr. Irwin Jacobson, an attending, Board-certified osteopath, stated that appellant was still under his care and that she was unable to work.

In an April 28, 2010 medical report, Dr. Jin J. Luo, a Board-certified neurologist, obtained a history of the June 25, 2008 employment injuries and appellant's medical treatment, social and family background. He listed his findings on physical examination and diagnosed peripheral polyneuropathy that was likely chronic inflammatory demylinaring polyneuropathy.

In a June 29, 2010 Form CA-17, Dr. Jacobson advises that appellant had postsurgical right ankle pain. He stated that she could return to her regular work duties on a full-time basis with no restrictions as of that date. Appellant did not return to work.

In addition to the medical evidence outlined, the record contains reports and memoranda generated by the employing establishment which document an on-going fraud investigation by the Postal Service Office of Inspector General.[2] These documents show that the employing establishment had direct in person contact with appellant's treating doctor on two occasions and showed him edited surveillance video of the claimant.[3] The agents informed Dr. Jacobson that they were pursuing a healthcare fraud investigation of appellant.[4] The agents talked about the video evidence with Dr. Jacobson and had him fill-out and sign under oath a Postal Service Questionnaire.[5] Dr. Jacobson signed an "Official Statement," drafted by a Postal Service Special Agent, which stated that he had watched only half the offered video and that he agreed that

[2] Memoranda from the Special Agent in Charge, Eastern Area Field Office, Office of Inspector General, U.S. Postal Service to the Regional Director U.S. Department of Labor, Office of Workers' Compensation Programs, dated May 12, 2009 and July 29, 2010 along with a supporting Report of Investigation (ROI) for each memorandum which described surveillance video obtained and interviews conducted by agents of the Postal Service with Dr. Irwin Jacobson on April 15, 2009 and June 29, 2010, Dr. Gene Shaffer, the surgeon, who operated on appellant and Marta Jaramillo, a Physician Assistant, both on April 15, 2009.

[3] Memorandum of Interview, bearing the name and badge logo of the Postal Service Office of Inspector General, dated June 29, 2010, 3 pages, identified as "Exhibit 13" in the materials provided with the memorandum to OWCP dated July 29, 2010 and a similar Memorandum of Interview, dated April 15, 2009, 2 pages, identified as "Exhibit 5 in the materials provided with the memorandum to OWCP dated May 12, 2009.

[4] *Id.*

[5] Questionnaire, bearing the name and law enforcement logo of the Postal Service Office of Inspector General, dated June 29, 2010, 2 pages, identified as "Exhibit 12" in the materials provided with the memorandum dated July 29, 2010.

appellant could work.[6] Also on June 29, 2010, Dr. Jacobson filled-out a Department of Labor Form CA-17 on which he checked a box indicating that appellant was able to return to regular work, a box indicating appellant could work full time and failing to note any medical restriction.[7]

During the discussion of appellant's claim, Dr. Jacobson suggested the special agents talk to appellant's other doctor:

> "Dr Jacobson [stated that] SA Dixon should talk with [appellant's] neurologist as well. He [stated], 'I do [not] see how Dr. Lou could [not] return [appellant] back to work full duty after seeing the video tape. If Dr Jacobson's tests show she has nerve damage, then I guess she can work with nerve damage.' SA Dixon [stated that] he would discuss interviewing Dr. Lou with his supervisor. [He] [stated] that it would be unusual give[n] that Dr. Jacobson was the deciding treating medical physician according to the Department of Labor."[8]

The memoranda and investigative materials state that the video evidence had been edited but contain no explanation of how it was edited or who performed the editing. The video evidence was not shown to Dr. Jacobson in its entirety and the interview materials do not note what she saw and what he declined to view.[9] The record does not contain evidence that appellant was aware in advance that her employer intended to present surveillance evidence to her doctors or that she ever had an opportunity to obtain a copy of the video and offer any explanation or comment. The surveillance information, tapes and memos, was intended to be kept secret.[10] The investigation of appellant began with a "Proactive review of individuals listed on the periodic rolls."[11] It is not clear from the record whether this type of investigation occurs often or is unique to appellant's case.

In addition to the visits to Dr. Jacobson's office on April 15, 2009 and June 29, 2010, there were visits and interviews with Dr. Gene Shaffer M.D. and Marta Jaramillo, a physician's

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[6] Identified as "Exhibit 11" in the material provided along with the Postal Service memorandum dated July 29, 2010.

[7] Duty Status Report, U.S. Department of Labor, identified as "Exhibit 10" in the materials provided with the memorandum to OWCP dated July 29, 2010.

[8] Memorandum of Interview, June 29, 2010, *supra* note 4.

[9] *Id.*

[10] The two Postal Service "Report of Investigation" documents which accompany the two memoranda from the Postal Service Inspector General's Office to OWCP, *supra* note 3, are apparently printed on special stationary which bares the notation "Restricted Information." The stationary also has the following statement:

> "This report is furnished on an official need to know basis and must be protected from dissemination which may compromise the best interests of the U.S. Postal Service Office of Inspector General. This report shall not be released in response to a Freedom of Information Act or Privacy Act request or disseminated to other parties without prior consultation with the Office of Inspector General. Unauthorized release may result in criminal prosecution."

[11] Postal Service Office of Inspector General, "Report of Investigation", July 14, 2010, section entitled "Predication."

assistant, both on April 15, 2009. Dr. Shaffer performed ankle surgery on appellant. He was shown part of the video and repeated that he had released appellant to sedentary duty. The special agent conducting the interview stated:

> "Dr. Shaffer was shown the limited-duty job offer, dated February 4, 2009 and stated [that] she would be able to perform those job duties. [He] completed an OWCP-5c Form, Work Capacity Evaluation Musculoskeletal Conditions, with Stewart's current restrictions."

Marta Jaramillo, P.A., showed some resistance to the interview process. After being shown some portion of the video by the agents, she declined to answer questions about appellant without legal advice.[12]

On August 3, 2010 OWCP issued a notice of proposed termination of appellant's wage-loss compensation and medical benefits based on Dr. Jacobson's medical opinion.

In an August 25, 2010 letter, appellant disagreed with OWCP's proposed action. She contended that she was misdiagnosed with a right ankle strain by an employing establishment physician. Appellant had lumbar peripheral polyneuropathy as diagnosed by Dr. Shaffer and Dr. Luo based on magnetic resonance imaging scan and electromyogram test results. In prescriptions dated August 4, 2010, he ordered medication to treat appellant's diagnosed condition.

In a September 22, 2010 decision, OWCP terminated appellant's wage-loss compensation and medical benefits effective September 26, 2010. It found that Dr. Jacobson's opinion represented the weight of the medical evidence.[13]

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to her employment, OWCP may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.[14] OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[15]

Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, OWCP

[12] Postal Service Office of Inspector General, Memorandum of Interview dated April 15, 2009.

[13] Following the issuance of OWCP's September 22, 2010 decision, OWCP received additional evidence. The Board may not consider evidence for the first time on appeal which was not before OWCP at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c) (1).

[14] *Jason C. Armstrong*, 40 ECAB 907 (1989).

[15] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

must establish that a claimant no longer has residuals of an employment-related condition that requires further medical treatment.[16] The attending physician must provide periodic, detailed reports as described in the regulations.[17] The FECA Regulations allow limited contact between the employing establishment and the employee's treating doctor but explicitly forbid contact by telephone or by direct, personal visit.[18]

Where OWCP intends to offer surveillance video as evidence to a physician for the purpose of obtaining a medical opinion, it must notify the employee of its intention to do so. If the employee requests a copy of the surveillance video OWCP must provide a copy. Appellant must then be afforded an opportunity to comment and explain the events depicted in the video.[19]

ANALYSIS

The issue before the Board is whether OWCP properly terminated appellant's benefits because the disability related to her accepted June 25, 2008 right ankle injury had fully resolved. The Board finds that OWCP did not meet its burden of proof to terminate compensation.

OWCP's decision dated September 22, 2010 relied on medical evidence that appellant's disability had ceased as stated on the Form CA-17 completed by Dr. Jacobson on June 29, 2010. The Board notes that this form was filled-out during the second of two visits to the attending physician's office by agents of the employing establishment. The regulatory violation could not be more obvious.[20] The fact that the Postal Service agents also made personal visits to appellant's surgeon and to a physician's assistant involved with her treatment removes the possibility chance that this regulatory violation was inadvertent. The fact that OWCP Regional Director received two official memoranda from the Postal Service suggests that OWCP was a

[16] *Mary A. Lowe*, 52 ECAB 223 (2001); *Wiley Richey*, 49 ECAB 166 (1997).

[17] Title 20 -- Employees' Benefits CHAPTER 1 -- OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR PART 10 -- CLAIMS FOR COMPENSATION UNDER THE FEDERAL EMPLOYEES' COMPENSATION ACT, AS AMENDED Subpart D -- Medical and Related Benefits § 10.332 What additional medical information will OWCP require to support continuing payment of benefits?

In all cases of serious injury or disease, especially those requiring hospital treatment or prolonged care, OWCP will request detailed narrative reports from the attending physician at periodic intervals. The physician will be asked to describe continuing medical treatment for the condition accepted by OWCP, a prognosis, a description of work limitations, if any, and the physician's opinion as to the continuing causal relationship between the employee's condition and factors of his or her Federal employment.

[18] Title 20 -- Employees' Benefits CHAPTER I -- OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR PART 10 -- CLAIMS FOR COMPENSATION UNDER THE FEDERAL EMPLOYEES' COMPENSATION ACT, AS AMENDED Subpart F -- Continuing Benefits § 10.506 May the employer monitor the employee's medical care?

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

[20] *Supra* note 16.

willing recipient of information obtained by methods which ECAB precedent and the Procedure Manual deny to OWCP claims examiners.[21]

It is clear from the record that OWCP accepted medical opinion evidence without probative value as dispositive. The record shows that the video evidence was edited but there is no information about how extensively it was edited or who decided what to eliminate from the tape.[22] The record shows that neither Dr. Jacobson nor Dr. Shaffer, interviewed at different times, saw the entire edited video (or whether they saw different edited video) and there is no indication whether they saw a representative sample of the video that was available.[23] The agents talked to Dr. Jacobson and placed their inquiry in the context of a fraud investigation before asking the doctor to opine whether appellant was disabled.[24] The agents also evaluated Dr. Jacobson's recommendation that they also interview Dr. Luo although this decision is a medical and claims management judgment.[25] It is clear that the agents of the employing establishment took an active, and on some issues decisive, role in developing appellant's claim and building the case for termination of her benefits. The Board finds that OWCP departed from the implementing federal regulations by relying on evidence obtained through direct contact between agents of the employer and appellant's treating doctor.[26]

Under ECAB precedent, OWCP should not have accepted the evidence as probative because the appellant was never informed of its existence and intended use and allowed to offer a comment or explanation. Almost 60 years ago, in a case involving witness statements, the Board cautioned in *Frederick Nightingale*:

> "More important, appellant should have been apprised of the conflicts and inconsistencies and the general nature of the adverse evidence developed, in order that he might know the nature of the issues to be met and have an opportunity to present such rebuttal or explanation as was available. This in the Board's view is vital in the non-adversary proceedings under the[FECA], as it is the function of

[21] *John M. Fuller*, 9 ECAB 320 (1957). In this case, the predecessor agency of OWCP denied a claim for a recurrence of a hernia based upon oral statements made by two doctors to an investigator when the doctors were explaining their reports and findings. ECAB set aside the denial of benefits and remanded the case. This opinion, cited in the FECA Procedure Manual § 2.0800.8(e), precludes OWCP from relying on oral statements of medical findings, opinion or rationale as competent evidence. In the case presently before ECAB it is not disputed that the special agents offered explained the surveillance evidence to the doctor and reported in their notes verbatim quotes from Dr. Jacobson.

[22] *Supra* note 9.

[23] For Dr. Jacobson, supra note 9. For Dr. Shaffer, United States Postal Service Office of Inspector General, Memorandum of Interview, dated April 15, 2009.

[24] The record cannot disclose the doctor's state of mind during his interview but the possibility exists that he may have feared that he, himself, might be dragged into the "fraud investigation" and therefore have exerted every effort to appear cooperative with the Special Agents.

[25] *Supra* note 9.

[26] *See H.C.*, Docket No. 11-627 (issued July 5, 2012).

> the Bureau[27] to adjudicate the rights of claimants in the light of all the relevant facts, facts which can only be developed fully when the claimant is fairly advised as to the nature of evidence from other sources which bears on his claim….
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> "The Board is aware of the informal processes employed in the administrative development of cases, and the techniques of investigation, which sometimes lead to records replete with hearsay evidence, and of the Bureau's responsibility to evaluate such evidence in the light of all the surrounding facts and circumstances of the particular case. [Citation omitted] For these reasons technical objections regarding the nature of the evidence are seldom of great moment, but there are limits beyond which the process cannot extend without serious prejudice to the right of the individual claimant or to the interests of the United States."[28]

The Board more recently addressed the issue of surveillance and imposed upon OWCP an obligation to disclose the existence of videotape evidence to the employee before it is shown to a doctor and to allow the employee to comment on and explain the events captured on tape:

> "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 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 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."[29]

In this case the Board reverses on several grounds. First, the employing establishment twice violated the regulations forbidding direct contact with appellant's treating doctor. That violation operates to strip the doctor's opinion of the status of a "treating doctor" opinion. It is clear that, regardless of intent, the employing establishment treated Dr. Jacobson, appellant's treating physician, as if he were not covered under a regulations which explicitly limits contacts with treating doctors while it procured from him an opinion favorable to its position. The employing establishment and OWCP subsequently assert that the opinion procured after, two prohibited contacts, is still that of a "treating doctor" and justifies the termination of benefits and medical care. OWCP should have rejected evidence generated by a violation of the applicable regulations.

[27] The Bureau of Employees' Compensation was a predecessor of the present OWCP.

[28] *Frederick Nightingale*, 6 ECAB 268, 271 (1953).

[29] *J.M.*, 58 ECAB 478, 486 (2007).

Second, the circumstances of the visits by special agents coupled with the vague record of the actual video evidence viewed by Dr. Jacobson, Dr. Shaffer and nurse Jaramillo create a prejudice which cannot be eradicated by any subsequent action by OWCP. During both visits to Dr. Jacobson, law enforcement agents of the employing establishment explained that they were acting in the context of a fraud investigation. He could not have failed to note that fact and reached draw some inferences about his patient, the appellant. The special agents discussed their investigation and evidence with Dr. Jacobson and certainly influenced the doctor's perception of the persuasive value of the video itself. The special agents offered their own judgment on whether Dr. Luo should be interviewed. This decision appears to be a medical or claims management judgment rather than one to be made by agents in a fraud investigation. The investigative materials in the record do not accurately and reliably identify the evidence Dr. Jacobson (or Dr. Shaffer or nurse Jaramillo) saw and used as the basis of his opinion. Dr. Jacobson's opinion in the Form CA-17 is, for these reasons, tainted and unpersuasive.[30]

Third, appellant did not learn that Dr. Jacobson, Dr. Shaffer and nurse Jaramillo were viewing secret evidence presented by the employing establishment. The Board has long disfavored the use of investigative evidence which is presented for the purpose of obtaining an adverse opinion, but not disclosed to the injured worker.[31] OWCP must notify employees of the existence of surveillance and of its intended use.[32] Appellant was not afforded this notice.

This opinion should not be read as a criticism of efforts to investigate possible instances of fraud or to prevent unwarranted payment of benefits or provision of services due to error or misunderstanding. The Board recognizes that OWCP and employing establishments have an affirmative duty to maintain the integrity of the system under which FECA benefits are provided. ECAB also recognizes the need to maintain an appropriate separation between the nonadversarial system of managing FECA claims and the investigative process of determining whether an employee is receiving unwarranted benefits and services.

The investigative practices of the Postal Service Office of Inspector General are not within the jurisdiction of ECAB. While there may be room for improvement with regards to the handling of physician contacts, that responsibility does not rest with this Board.

In this appeal, the nonadversarial claims administration process was impermissibly mingled with the investigative process. For the reasons stated, the Board finds that OWCP accepted as evidence information useful to building a criminal or civil case but which lacked

[30] ECAB has decided at least one recent appeal which did present the issue of whether surveillance conducted by the employing establishment could, in effect, poison the evidence used by OWCP in a termination case. In *K.M.*, the Board held that an interview of the appellant's treating doctor by agents of the Postal Service O.I.G. did not prevent an affirmance of OWCP's order terminating appellant's wage loss benefits. The agents showed the doctor video tape. It is difficult to harmonize that opinion with the Board's holding in this appeal except on the basis that appellant in *K.M.* argued that her physician had been coerced into offering an opinion and ECAB found no evidence of coercion. Appellant in K.M. did not argue 20 C.F.R. 10.506 or the opinions in *Nightingale* or *J.M. K.M.*, Docket No. 10-695 (issued January 25, 2011).

[31] *Supra* note 27.

[32] *Supra* note 28.

sufficient indicia of probative value or even conformity with federal regulations. The use of that information to terminate appellant's benefits and medical care requires that we reverse.

CONCLUSION

The Board finds that OWCP did not properly terminate appellant's compensation and medical benefits effective September 26, 2010 on the grounds that she no longer had any residuals or disability causally related to her accepted right ankle sprain and consequential osteochrondritic desiccans of the right ankle.

ORDER

IT IS HEREBY ORDERED THAT the September 22, 2010 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 26, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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