

**United States Department of Labor
Employees' Compensation Appeals Board**

R.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Kansas, MO, Employer**

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**Docket No. 12-501
Issued: March 19, 2013**

Appearances:
Andrew Schendel, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 10, 2012 appellant, through his representative, filed a timely appeal from the December 9, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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.

FACTUAL HISTORY

On January 25, 2006 appellant, then a 45-year-old custodian, sustained a low back injury in the performance of duty while dumping trash. OWCP accepted his claim for lumbar sprain/strain, spinal stenosis at L4-5, postoperative infection and chondromalacia of the right patella. Appellant underwent spinal surgery on September 5 and December 15, 2006. He

¹ 5 U.S.C. § 8101 *et seq.*

underwent a chondroplasty of the right patella on March 9, 2007.² Appellant had retired on disability on December 14, 2007, but elected to be placed on the periodic rolls effective December 5, 2009.³

Appellant was referred to the nurse intervention program on December 17, 2009, after being released by Dr. Alexander S. Bailey, the attending Board-certified orthopedic surgeon, to light work. The employing establishment did not have light duty available. Appellant later underwent two authorized surgical procedures to implant dorsal column stimulators. Dr. Bailey eventually released appellant to limited duty with lifting of no more than 20 pounds effective June 9, 2010.

Dr. Alexander later eliminated any limitations and returned appellant to regular duty on June 22, 2010. On August 11, 2010 OWCP proposed to terminate appellant's wage-loss compensation.

Dr. Bailey later explained, in his August 20, 2010 report, that he had viewed a surveillance video from the Office of the Inspector General (OIG) showing appellant moving items onto a moving truck. Based on his review of that video, he had reassessed appellant's overall functional abilities and found him essentially normal. Appellant acknowledged his awareness of the video and the OIG report, but denied ever lying or misrepresenting his condition. At appellant's request, Dr. Bailey ordered a functional capacity evaluation (FCE) which he stated was an objective test to determine appellant's functional status and one that would be able to identify malingering or self-limiting behavior.

The FCE was identified as being a "Conditionally Valid representation of the present physical capabilities of [appellant] based upon consistencies and inconsistencies when interfacing grip dynamometer graphing, resistance dynamometer graphing, heart rate variations, weights achieved and selectivity of pain reports and pain behaviors." The results were found to represent the levels appellant perceived as his capacity, despite the fact that it was determined appellant could do physically more. "The client is likely to believe that working beyond their 'perceived' levels may cause them pain or increased discomfort."⁴ Appellant did not demonstrate the ability to perform the lifting and carrying required of his job. "Unfortunately, due to [his] Conditionally Valid effort in today's assessment, it is undetermined whether he is or is not able to parallel his job demands at this time."

On September 17, 2010 Dr. Bailey explained that the FCE was the best way to resolve the dispute, as it objectively defined work status by taking the decision making out of the

² Other accepted claims include OWCP File No. xxxxxx238 (lumbar strain, date of injury May 4, 1982) and OWCP File No. xxxxxx901 (herniated disc, date of injury January 23, 1995). Appellant underwent surgical fusion at L4-S1.

³ This case has previously been before the Board. By decision dated May 10, 2010, the Board affirmed a schedule award for appellant's right leg for 21 percent permanent impairment but remanded the case to OWCP for further development as to the permanent impairment of the left leg. *R.H.*, Docket No. 09-1175 (issued May 10, 2010).

⁴ Compare an invalid participation, in which the client consciously represented less than full effort.

videotape and out of a physician's hand and placing it more on a third-party physical finding. He noted that appellant's physical examination and review of systems remained unchanged. Appellant continued to have back pain, leg pain and a variety of pain complaints and the physical examination findings were difficult to interpret.

Dr. Bailey reviewed the FCE and explained that appellant was instructed to stop if he had a perception that it was going to increase pain. The test was not invalid, he stated, but was certainly not a valid full effort. Dr. Bailey placed appellant at a light physical demand level. Stating that he felt more like an attorney interpreting this information than a doctor, he released appellant to what his FCE indicated, a light physical demand level permanently.

In a September 28, 2010 decision, OWCP terminated appellant's wage-loss compensation. It found that Dr. Bailey had not provided valid reasons for releasing appellant to a permanent light physical demand level; had not addressed that it was undetermined from the FCE whether appellant was able to parallel his job demands; and had not explained why appellant was capable of the physical activities performed in the surveillance video but unable to perform the FCE activities. Consequently, OWCP found appellant had failed to provide evidence to alter the proposed termination of wage-loss compensation.

Counsel for appellant requested an oral hearing by letter dated October 1, 2010.

On October 4, 2010 Dr. Bailey stated that as OWCP was basing its decision on the FCE, he would suggest that the FCE assessment specialist should provide appellant's work restrictions. Appellant's effort was conditionally valid, and Dr. Bailey did not know how to provide better work status restrictions. "Given the multiply-operated lumbar spine, light physical demand level is appropriate and accurate in my professional medical and ethical opinion." If OWCP chose not to take his opinion, Dr. Bailey recommended it contact another physician or repeat the FCE at an outside facility for further clarification.

Counsel for appellant, by letter dated February 23, 2011, requested a copy of the video surveillance tape and submitted further medical evidence.

At the hearing, appellant reiterated his request for a copy of the surveillance video: "I've got to point out that despite several requests we have never been provided with a copy of this DVD. I believe the most basic notion of due process entitles [appellant] to confront the evidence that's been used to terminate his benefits."

OWCP's hearing representative, by decision dated April 13, 2011, affirmed the termination of appellant's wage-loss compensation. The hearing representative found that appellant failed to meet his burden of proof to submit well-reasoned medical evidence to support that he could not perform his date-of-injury job. The hearing representative noted that Dr. Bailey failed to provide any objective evidence to support his change of opinion.

On January 21, 2011 appellant requested reconsideration of OWCP's hearing representative's decision and, by decision dated December 9, 2011, OWCP denied modification of its prior decision.

LEGAL PRECEDENT

Pursuant to FECA, once OWCP accepts a claim and pays compensation, it has the burden of justifying termination or modification of an employee's benefits.⁵ OWCP may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.⁶ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁷

The United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁸ Having accepted a claim and initiated payments, OWCP may not terminate compensation without a positive demonstration by the weight of evidence that entitlement to benefits has ceased.⁹ The inadequacy or absence of a report in support of continuing benefits is not sufficient to support termination and benefits should not be suspended for that reason.¹⁰

ANALYSIS

OWCP accepted appellant's injury claim and paid compensation for temporary total disability on the periodic rolls. It therefore had the burden of proof to justify terminating his compensation. The Board reverses.

OWCP based its termination on an opinion from the attending orthopedic surgeon, Dr. Bailey, who did not give a consistent opinion on appellant's disability status. As of June 9, 2010 Dr. Bailey had released appellant to limited duty, with a 20-pound lifting restriction based on his accepted condition. A few days later, on June 22, 2010, after viewing a short surveillance video, he released appellant to regular duty. Before OWCP could terminate appellant's wage-loss compensation, Dr. Bailey changed appellant's restrictions based on the results of the FCE, which he had explained was an objective test able to identify malingering or self-limiting behaviors.

Appellant's participation in the FCE was deemed conditionally valid. This meant he was found not to be malingering. Although the assessment specialist concluded he could have done more, appellant was found to have made no conscious attempt to give less than full effort. In doing so, he was unable to perform the lifting and carrying demands of his date-of-injury job.

⁵ *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁶ *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

⁷ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁸ 5 U.S.C. § 8102(a).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.3 (July 1993).

¹⁰ *Id.* at Chapter 2.812.8(c)(1) (June 2003).

As the results were only conditionally valid, the assessment specialist concluded that it was undetermined whether appellant could perform the physical demands of his job.

Thus, the FCE was not a positive demonstration that appellant's entitlement to wage-loss compensation had ceased. To the contrary, Dr. Bailey now believed that appellant should be restricted permanently to a light physical demand level, as the FCE indicated. He cited FCE as the best way to resolve the matter, as it objectively defined work status. Dr. Bailey gave an additional reason for changing his opinion: a light physical demand level was appropriate and accurate given the multiple operations on appellant's lumbar spine. He firmly stated that this was his professional medical and ethical opinion.

The Board notes that Dr. Bailey gave this opinion notwithstanding the surveillance video and his initial reaction to it. In the end, Dr. Bailey thought better of his initial reaction, as appellant was objectively shown not to be malingering and as light duty was medically appropriate under the circumstances in any event. OWCP faulted him for not explaining why appellant was capable of the physical activities performed in the surveillance video but unable to perform the FCE activities. The hearing representative noted that appellant had "failed to meet his burden of proof to submit well-reasoned medical evidence to support that he cannot perform his date-of-injury job, as originally indicated by Dr. Bailey." It is not appellant's burden, however, to submit probative evidence that he remains entitled to compensation. It is OWCP's burden to make a positive demonstration by the weight of evidence that entitlement has ceased.¹¹ It may not rely on the inadequacy of Dr. Bailey's opinion to justify the termination of compensation. If OWCP did not accept his final answer, it should have further developed the evidence, as Dr. Bailey suggested.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to justify terminating appellant's wage-loss compensation.

¹¹ *Supra* note 5.

ORDER

IT IS HEREBY ORDERED THAT the December 9, 2011 decision of the Office of Workers' Compensation Programs is reversed. The case is remanded for further action.

Issued: March 19, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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