

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

D.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Rahway, NJ, Employer**

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**Docket No. 14-451
Issued: August 12, 2014**

Appearances:
Robert D. Campbell, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Acting Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On December 23, 2013 appellant, through her attorney, filed a timely appeal from a June 28, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying reconsideration. The final merit decision of record is dated September 13, 2012. There is no merit decision within 180 days of December 23, 2013 the date appellant filed her appeal with the Board. Therefore, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of this case.²

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration.

¹ 5 U.S.C. § 8101 *et seq.*

² Appellant requested an oral argument. The Clerk of the Board mailed a letter to appellant to confirm a continuing desire for an oral argument in Washington, DC. No written confirmation was received; thus the Board has decided the appeal on the record.

On appeal, appellant's counsel asserts that OWCP erred by relying on surveillance videos of appellant and evidence derived from the employing establishment's improper contact with her physician. He noted that it did not produce the video when requested to allow counsel to review it. Counsel therefore contended that OWCP was precluded from relying on the surveillance video in adjudicating appellant's claim. He reiterated that it failed to fully consider the medical evidence.

FACTUAL HISTORY

OWCP accepted that on August 17, 2004 appellant, then a 49-year-old letter carrier, sustained a left knee contusion when she struck her left knee on her postal vehicle door. A September 2, 2004 magnetic resonance imaging (MRI) scan of the left knee showed a complex tear of the posterior horn and body of the medial meniscus, a partial tear of the anterior cruciate ligament and a Baker's cyst. Appellant received wage-loss compensation on the periodic rolls.³

Dr. Walter Urs, an attending Board-certified orthopedic surgeon, held appellant off work pending left knee surgery. On December 2, 2004 he performed an arthroscopic partial lateral meniscectomy. Dr. Urs held appellant off work through 2009.⁴

On February 1, 2010 agents of the employing establishment's Office of the Inspector General (OIG) interviewed Dr. Urs at his office and showed him a "videotape of [appellant's] activities captured during surveillances. Activities on the video included walking (at times wearing heels), bending, squatting, with no apparent pain or difficulty." Dr. Urs told the agents that based on the activities portrayed in the video, he would complete a work restriction evaluation allowing appellant to return to work with restrictions.

In reports from February 10, 2010 to October 14, 2011, Dr. Urs found appellant able to perform full-time sedentary work, with lifting limited to 10 pounds. Appellant remained off work.

In a July 14, 2011 memorandum, the employing establishment investigative agents described surveillance video taken of appellant between April 14 and December 22, 2009. Appellant was seen walking, standing, driving and reaching. She also gardened for prolonged periods.

On August 19, 2011 OWCP obtained a second opinion from Dr. Sean Lager, a Board-certified orthopedic surgeon, who found a positive left patellar grind test but no other deficits of the left knee. Dr. Lager opined that appellant could return to full duty with no restrictions.

³ On May 4, 2007 appellant claimed a schedule award. She deferred the development of the claim until such time she was no longer receiving wage-loss compensation on the periodic rolls.

⁴ On October 31, 2006 OWCP obtained a second opinion Dr. Iqbal Ahmad, a Board-certified orthopedic surgeon, who found appellant able to perform full-time light-duty work. Dr. Ahmad provided a November 21, 2006 supplemental report opining that the accepted left knee contusion had resolved without residuals. On September 13, 2007 and January 7, 2010 OWCP obtained a second opinion from Dr. David Rubinfeld, a Board-certified orthopedic surgeon, who found active residuals of the accepted left knee injury.

In an October 24, 2011 letter, counsel requested copies of Dr. Lager's report, curriculum vitae, the statement of accepted facts and questions presented.

OWCP found a conflict of opinion between Dr. Urs, for appellant and Dr. Lager, for the government, regarding the nature and extent of any continuing injury-related residuals. To resolve the conflict, it selected Dr. Dean L. Carlson, a Board-certified orthopedic surgeon. In a November 28, 2011 report, Dr. Carlson reviewed the medical record and a statement of accepted facts. On examination, he found full range of motion of the left knee, a negative grind test and no instability. Dr. Carlson obtained left knee x-rays which showed the knee within normal limits. He diagnosed status post left knee arthroscopic lateral meniscectomy, with a complete recovery. Dr. Carlson found appellant able to work full-time full duty with no restrictions. In June 20, July 11 and 12, 2012 supplemental reports, he found she was able to lift 35 pounds frequently and up to 70 pounds occasionally. Dr. Carlson noted that appellant's presentation was "as one sees with persons acting out" and that her actions were "characteristic of no known disease to [his] knowledge."

Dr. Urs submitted periodic reports through July 16, 2012 noting continued left knee pain with chondromalacia.

By notice dated August 7, 2012, OWCP advised appellant that it proposed to terminate appellant's wage-loss and medical benefits on the grounds that the accepted left knee injury had ceased without residuals, based on Dr. Carlson's opinion.

Counsel responded by September 4, 2012 letter, asserting that appellant continued to have active chondromalacia of the patella related to the accepted left knee injury. He provided her August 28, 2012 statement describing continued left knee pain and difficulty with activities of daily living. Counsel also submitted an August 20, 2012 report from Dr. Urs restricting appellant to sedentary duty. He found a full range of left knee motion without instability.

By decision dated September 13, 2012, OWCP terminated appellant's wage-loss and medical compensation benefits effective that day, based on Dr. Carlson's opinion that the accepted left knee injury had ceased without residuals.

In a September 17, 2012 letter, counsel asserted that Dr. Carlson could not serve as impartial medical examiner as he had a prior connection with the case. He argued that OWCP had sought a supplemental opinion from Dr. Carlson. In a September 25, 2012 letter, counsel requested a telephonic hearing, held January 15, 2013. At the hearing, appellant noted that she returned to work in December 2012 but had problems due to left knee pain.

Following the hearing, counsel submitted February 5, 2013 reports from Dr. Robin R. Inella, an attending Board-certified orthopedic surgeon,⁵ diagnosing a left medial meniscus tear and spinal stenosis. A January 30, 2013 lumbar MRI scan showed L4-5 and L5-S1 disc bulges with right foraminal stenosis. A January 30, 2013 left knee MRI scan showed a partial anterior cruciate ligament tear or possible degeneration, a body and posterior horn tear of the medial meniscus and partial tear of the medial head of the gastrocnemius tendon. In February 7 and

⁵ Dr. Urs passed away in October 2012.

March 8, 2013 letters, counsel asserted that these reports established continuing injury-related disability.

By decision dated and finalized March 13, 2013, an OWCP hearing representative affirmed the September 13, 2012 termination decision. The hearing representative explained to counsel that a request for a supplemental report from an impartial medical examiner did not constitute prior involvement that would invalidate the physician's status as impartial medical examiner. The hearing representative did not address the issue of continuing disability.

In a March 26, 2013 letter, counsel requested reconsideration. He contended that under a Board precedent issued on September 26, 2012 under Docket No. 11-863, OWCP erred by relying on evidence "obtained through direct contact between agents of the [employing establishment] and appellant's treating physician.... OWCP should have rejected evidence generated by a violation of the applicable regulations" under 20 C.F.R. § 10.506. Counsel also asserted that OWCP did not fully consider the medical evidence. In an April 2, 2013 letter, he again argued that the Board's decision in *F.S.*, Docket No. 11-863 (issued September 26, 2012) rendered OWCP's termination erroneous. Counsel enclosed a copy of the decision.

By decision dated June 28, 2013, OWCP denied reconsideration on the grounds that it did not contain new, relevant evidence or legal argument. It found that counsel's argument and submission of the Board's decision in *F.S.* did not warrant a merit review.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁶ section 10.606(b)(2) of Title 20 of the Code of Federal 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.⁷ Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.⁸

In support of a request for reconsideration, appellant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.⁹ She need to only submit relevant, pertinent evidence not previously considered by OWCP.¹⁰ When reviewing an OWCP decision denying a merit review, the function of the Board is to determine whether it

⁶ 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.606(b)(2).

⁸ *Id.* at § 10.608(b). *See also D.E.*, 59 ECAB 438 (2008).

⁹ *Helen E. Tschantz*, 39 ECAB 1382 (1988).

¹⁰ *See* 20 C.F.R. § 10.606(b)(3). *See also Mark H. Dever*, 53 ECAB 710 (2002).

properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.¹¹

ANALYSIS

OWCP accepted that appellant sustained a left knee contusion on August 17, 2004. Dr. Urs, an attending Board-certified orthopedic surgeon, performed a partial left lateral meniscectomy on December 2, 2004. He found appellant totally disabled for work through 2009. Following a February 1, 2010 meeting with the employing establishment's investigative agents during which he viewed surveillance video of appellant's activities, Dr. Urs found her able to perform full-time sedentary work as of February 10, 2010. As Dr. Lager, a Board-certified orthopedic surgeon and second opinion physician, opined that she could return to full duty, OWCP selected Dr. Carlson, a Board-certified orthopedic surgeon, as impartial medical examiner, who opined that she had no residuals of the accepted injury and could perform full-duty work. On September 13, 2012 OWCP terminated her wage-loss and medical benefits based on Dr. Carlson's opinion that the accepted left knee contusion had resolved without residuals. Following a hearing, it affirmed the termination by decision dated March 13, 2013.

Counsel requested reconsideration by March 26, 2013 letter. He argued that OWCP erred by relying on evidence improperly obtained through direct contact between employing establishment agents and Dr. Urs. Counsel cited to the Board's decision in *F.S.*,¹² noting the Board's holding that "OWCP should have rejected evidence generated by a violation of the applicable regulations" under 20 C.F.R. § 10.506. He reiterated this argument in an April 2, 2013 letter and enclosed a copy of *F.S.* OWCP denied reconsideration by June 28, 2013 decision, finding that counsel's request did not present new, relevant evidence or argument. The Board finds that it appropriately denied reconsideration as counsel's argument was not relevant to the claim.

The Board's ruling in *F.S.* is not relevant to the present claim due to a significant difference in the facts of the two cases. In its holding in *P.S.*,¹³ the Board noted that in *F.S.*, OWCP "solely relied on an attending physician's report, rendered after he was shown a surveillance video." In *P.S.*, as in the present claim, OWCP did not rely solely on the attending physician's report, but on the opinion of an impartial medical examiner. The Board notes that in the present claim, Dr. Carlson opined that appellant's clinical presentation was fictitious and not indicative of any known pathology. Also, as the Board noted in *F.S.* and in *P.S.*, the

¹¹ *Annette Louise*, 54 ECAB 783 (2003).

¹² Docket No. 11-863 (issued September 26, 2012).

¹³ *P.S.*, Docket No. 13-1018 (issued June 19, 2014).

investigative practices of an employing establishment's OIG are not within the jurisdiction of the Board.¹⁴ The Board commented that "[w]hile there may be room for improvement with regards to the handling of physician contacts that responsibility does not lie with the Board."¹⁵ Therefore, assertions regarding the OIG's February 1, 2010 meeting with Dr. Urs being in violation of 20 C.F.R. § 10.506 do not show that OWCP erroneously applied or interpreted a specific point of law nor does it advance a relevant legal argument not previously considered by OWCP.

A claimant may be entitled to a merit review by submitting new and relevant evidence or argument. Counsel did not do so in this case. The underlying issue in the March 13, 2013 merit decision was a medical question as to whether the September 13, 2012 termination was proper. Counsel's March 26 and April 2, 2013 letters do not contain new, relevant legal arguments on that issue. Therefore, pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

On appeal, counsel asserts that OWCP was precluded from relying on the surveillance videos of appellant as they were shown to Dr. Urs through impermissible direct contact. As stated above, the conduct of the employing establishment's investigative agency is not within the Board's jurisdiction and such matters are not relevant to the underlying issue in the matter. Regarding counsel's contention that OWCP did not provide him a copy of the video to review, the Board notes that there is no evidence of record that counsel requested to view the surveillance video. The Board has held that if a "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."¹⁶ However, counsel did not make such request in this case prior to OWCP's June 28, 2013 decision. He also reiterated that OWCP failed to fully consider the medical evidence. The Board notes that there is no indication of record that OWCP did not properly develop the medical evidence in this case.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration.

¹⁴ *Supra* note 12, *P.S., id.* Furthermore, in an order denying petition for reconsideration in *F.S.*, Docket No. 11-863 (issued May 8, 2014), the Board noted that the petition was "largely premised on a misperception that the Board's decision somehow imposed a limitation on the ability of an agency's OIG to conduct audits or investigations in the administration of [FECA]" but noted that the "Board does not have such authority nor was such an ability even suggested."

¹⁵ *Supra* note 13.

¹⁶ *J.M.*, 58 ECAB 478 (2007).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 28, 2013 is affirmed.

Issued: August 12, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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