United States Department of Labor
Employees' Compensation Appeals Board

J.H., Appellant	)	
and	)	**Docket No. 13-1032**
	)	**Issued: September 26, 2014**
U.S. POSTAL SERVICE, POST OFFICE, North Metro, GA, Employer	)	

Appearances:
Debra Hauser, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 26, 2013 appellant, through her attorney, filed a timely appeal from a November 2, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). 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.[2]

ISSUE

The issue is whether OWCP properly terminated appellant's compensation benefits effective November 3, 2012 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.*

[2] The Board notes that, following the issuance of the November 2, 2012 OWCP decision, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c)(1).

On appeal, counsel contends that OWCP improperly: (1) relied upon evidence it received from the employing establishment which was obtained in violation of federal regulations, citing 20 C.F.R. § 10.506, claiming appellant was not notified that an investigation was taking place against her and that surveillance video was gathered, or that an investigator interviewed her doctor; and (2) relied upon second opinion reports from Dr. Harold Alexander, a Board-certified orthopedic surgeon, which were based on a prejudicial statement of accepted facts, that included observations from surveillance video.

FACTUAL HISTORY

OWCP accepted that appellant, then a 46-year-old mail processing clerk, sustained a neck strain and right shoulder strain in the performance of duty on March 16, 2009. On March 4, 2010 appellant accepted a limited-duty position, but stopped work on September 22, 2010 when the employing establishment was no longer able to accommodate her work restrictions.[3] She was placed on the periodic rolls to receive wage-loss compensation and has not returned to work.

Dr. Scott Pennington, appellant's attending physician and a Board-certified orthopedic surgeon, in early April 2012, had produced a work evaluation which found that appellant could not work her usual job. He restricted her from overhead activities and imposed a five-pound limitation of pushing, pulling and lifting. Dr. Pennington stated that appellant had not reached maximum medical improvement following her accepted work injury.

In a July 20, 2012 report, Dr. Pennington opined that appellant was capable of performing her regular job duties and released her to full-duty work without restrictions.

A July 20, 2012 memorandum from the employing establishment's Office of Inspector General (OIG) indicated that special agents had conducted an in-person interview with Dr. Pennington that same day. They informed him that appellant was being investigated for workers' compensation fraud and showed a surveillance video of her "engaged in activities using her right arm with no indication of pain or discomfort." The investigative report states that Dr. Pennington felt appellant was being disingenuous in regards to her condition and opined that she would be able to return to full duty without restrictions. He noted his new opinion in a Form OWCP-5c (Work Capacity Evaluation -- musculoskeletal conditions) dated July 20, 2012.

Investigative reports dated August 14, 2012 from the employing establishment's OIG specified that surveillance video observed appellant bending over and releasing a bowling ball on November 10, 2011 and using her right arm to retrieve an item from the top shelf at a grocery store on February 7, 2012.[4]

In an August 20, 2012 letter to the employing establishment, OWCP indicated that it had reviewed the July 20, 2012 investigative report and would refer appellant for a second opinion examination in order to determine any further entitlement to compensation benefits. It noted that the referral physician was to be provided with a copy of the surveillance video for review.

[3] Appellant filed a notice of recurrence (Form CA-2a) on October 8, 2010.

[4] The case record contains detailed surveillance reports for the period October 4, 2011 through July 19, 2012.

Appellant was referred to Dr. Harold N. Alexander, a Board-certified orthopedic surgeon, for a second opinion evaluation on September 11, 2012 to determine the nature and extent of her employment-related conditions. A statement of accepted facts was prepared and forwarded to Dr. Alexander.

By letter dated September 6, 2012, OWCP notified appellant that it proposed to terminate her compensation benefits based on the weight of the medical evidence, as represented by Dr. Pennington. It allotted 30 days for appellant to submit additional evidence or argument in disagreement with the proposed action.

In his September 20, 2012 report, Dr. Alexander conducted a physical examination and reviewed the statement of accepted facts, history of the injury and the medical evidence of record. He opined that appellant's neck strain had resolved. Dr. Alexander noted that the statement of accepted facts indicated that in February 2012 appellant was videotaped and observed by a special agent using her right arm to reach above her head and push a shopping cart in a grocery store. He indicated that his findings upon examination were inconsistent with the surveillance video and when he asked her if she had difficulty reaching up on shelves, she indicated that she did not do it and had her son do it. On October 25, 2012 Dr. Alexander reviewed an October 4, 2012 magnetic resonance imaging (MRI) scan of the right shoulder and found no rotator cuff tear and some degenerative change at the acromioclavicular (AC) joint. He opined that appellant was capable of returning to her usual job with restrictions due to the fact that she had been observed using the arm in a close to normal fashion. On a work capacity evaluation form dated on or about October 25, 2012, Dr. Alexander checked a "yes" box indicating that appellant could perform her usual job, but immediately below that question, he also checked "yes" on a question box which indicated that appellant could not perform her usual job but could work eight hours with restrictions. He then listed restrictions on sitting, walking, standing, reaching, and reaching above the shoulder, twisting, bending, stooping, operating a motor vehicle, repetitive movements of the wrists and elbows, squatting, kneeling, climbing and prescribed 15- to 20-minute breaks morning and afternoon.

Subsequently, appellant submitted a September 29, 2012 narrative statement indicating her belief that the employing establishment was allowed only to contact her doctor in writing regarding her work limitations, never verbally. She also submitted a September 21, 2012 report from Dr. Pennington. He indicated that he was presented by an inspector with a video of appellant using her arm, including overhead activities, without difficulty, and because of that information he placed her at maximum medical improvement and returned her to full-duty work. In another report dated October 12, 2012, Dr. Pennington diagnosed resolved shoulder strain and released her to regular duty.

By decision dated November 2, 2012, OWCP terminated appellant's wage-loss compensation benefits effective November 3, 2012. It did not terminate medical benefits.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.[5] After it has determined that an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[6] OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[7] The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.[8] To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.[9]

The purpose of a statement of accepted facts is to allow a physician to form an impression of the individual and the evidence to be evaluated. The statement of accepted facts should state the conditions claimed and accepted by OWCP, so the physician can assess whether the diagnoses given in the medical evidence to be reviewed, as well as his own diagnoses, are consistent with the condition(s) for which the claim was filed or accepted.[10] OWCP procedures provide that a statement of accepted facts must contain the date of injury, claimant's age, the job held on the date of injury, the mechanism of injury and the claimed or accepted conditions. OWCP may also include additional elements, including appellant's prior medical history, depending on the nature of the condition claimed and the issues to be resolved.[11] Not all information contained in a case file bears on the issues to be resolved in connection with the statement of accepted facts. Some information is irrelevant, while other material is inappropriate prejudicial or better discussed elsewhere. Medical opinions should not be included in the statement of accepted facts.[12]

The weight of medical evidence is determined by the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of

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

[6] *See I.J.*, 59 ECAB 524 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

[7] *See J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

[8] *See T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

[9] *See James F. Weikel*, 54 ECAB 660 (2003).

[10] *Gwendolyn Merriweather*, 50 ECAB 416 (1999); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statement of Accepted Facts*, Chapter 2.809 (September 2009).

[11] *Darletha Coleman*, 55 ECAB 143 (2003).

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Case/Disability Management*, Chapter 2.809.7(c).

the opinion.[13] Medical opinions based on incomplete history or which are speculative or equivocal are of diminished probative value.[14]

ANALYSIS

OWCP accepted that appellant sustained a neck strain and right shoulder strain while in the performance of duty and paid her wage-loss compensation. It bears a burden of proof to establish that her work-related disability has ceased before it can terminate benefits.[15]

Following a meeting with special agents from the employing establishment's OIG, Dr. Pennington advised in a Form OWCP-5c dated July 20, 2012 that appellant was able to return to full-duty work without restrictions. In its November 2, 2012 decision, OWCP terminated appellant's wage-loss compensation on the basis of Dr. Pennington's July 20, 2012 form report and Dr. Alexander's September 20 and October 25, 2012 second opinion reports.

The Board finds that the opinion of Dr. Pennington, expressed following the visit of the Postal Inspectors, was tainted and cannot support a termination of benefits by OWCP.[16] Dr. Pennington's new opinion, dated July 20, 2012, that appellant could work full duty and without restrictions at her preinjury job, was obtained by and delivered to OWCP by the Postal Service OIG. It was totally different from the opinion the doctor had rendered less than three months earlier. Dr. Pennington did not specifically explain what new evidence he had reviewed or why it had caused him to reverse all his prior opinions. The record also shows no involvement by OWCP in obtaining Dr. Pennington's July opinion.

OWCP procedures governing second opinion examinations control and limit the use of investigative material provided by the employing establishment.[17] OWCP has more stringent procedures to exclude surveillance video provided directly to a referee physician by the

[13] *James R. Taylor*, 56 ECAB 420 (2005).

[14] *Cecelia M. Corley*, 56 ECAB 662 (2005).

[15] 20 C.F.R. § 10.503, The Board has required thorough, explicit opinions supported by factual evidence and with sufficient discussion to relate the facts with the conclusions reached. *See T.C.*, Docket No. 13-441 (issued June 4, 2013) (the Board found that the termination standard was not met where medical opinion was that appellant could do sedentary work but appellant's date-of-injury job required higher level of activity); *M.R.*, Docket No. 11-1566 (issued February 8, 2012) (the Board found that the termination standard was not met to show that appellant refused suitable employment); *N.S.*, Docket No. 10-303 (issued October 14, 2010) (the Board affirmed standard to terminate met and discussed medical evidence); *R.M.*, Docket No 08-1736 (issued June 9, 2008); (the Board found that the termination standard was not met to show refusal of suitable employment and discussed medical evidence) .

[16] *F.S.*, Docket No. 11-863 (issued September 26, 2012); *A.P.*, Docket No. 13-30 (issued March 18, 2003).

[17] A second opinion specialist may be instructed by the claims examiner to disregard video evidence submitted directly to him or her by the employing establishment where the agency fails to provide a copy of the evidence to the claims examiner. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.9g (June 2014).

employing establishment.[18] These Board precedents and the provisions of the procedure manual operate in harmony together to assure that OWCP will retain control of the administration of claims and can communicate with the claimant based upon a full knowledge of the case.[19]

In addition to the opinion of Dr. Pennington, OWCP relied, in its November 2, 2012 termination decision, on the second opinion physician, Dr. Alexander, and his report of September 20, 2012 and an addendum dated October 25, 2012. It correctly recognized that the report of Dr. Pennington, dated July 20, 2012, lacked rationale to explain why his opinion had changed and why appellant could return to full-duty work. OWCP thus properly scheduled a second opinion examination.[20] It is not precluded from providing surveillance evidence to an unbiased physician provided it follows the procedure manual.[21]

OWCP provided Dr. Alexander with a statement of accepted facts dated September 6, 2012 which amended an earlier statement of accepted facts dated August 20, 2012 by adding the following paragraph:

> "In February 2012, the claimant was observed and videotaped by a Special Agent of the US Postal Service Office of the Inspector General. The claimant was observed shopping at a grocery store, using her right arm and reaching above her head **without any sign of discomfort.** (Emphasis added.) The claimant shopped in the store for approximately 45 minutes. During the time, she pushed the shopping cart, reached above her head with her right arm and unloaded her cart using her right arm. She also closed the tailgate on her sport utility vehicle with her right arm."[22]

Appellant contends that the repetition of statements from the investigative report was prejudicial to her and influenced the doctor's opinion on whether she was disabled and whether

[18] "If a surveillance video is provided by the EE [employing establishment] directly to a medical specialist acting in the capacity of a referee physician, the CE [claims examiner] should advise the EE that the physician's opinion has been tainted and will be excluded from consideration in OWCP's decision. If there is convincing evidence that the surveillance video is vital to the case and should be used, the CE should direct the EE to provide OWCP with a copy of the video to be used in conjunction with a referral to a new referee specialist." Federal (FECA) Procedure Manual, *id*. at Chapter 2.810.12a.

[19] OWCP directs claims examiners to monitor the eligibility of claimants who receive benefits. The claims examiner is directed to provide a copy to the claimant of any request for information from the claimant's attending physician. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.6 (May 2012).

[20] The Board notes that on or about August 27, 2012 a special agent of the OIG called OWCP to express concern and request the reason a second opinion examination had been scheduled for appellant. The call notation in the record indicates that OWCP had determined that the opinion of Dr. Pennington lacked the necessary explanation and rationale to support termination.

[21] *J.M.*, *supra* note 7.

[22] This language is an exact quote from the investigative report on surveillance except that the report named the grocery store.

she could work. The Board finds that the addition of the words "without any sign of discomfort" was a statement of opinion and should not have been placed in the statement of accepted facts.[23]

On appeal, counsel contends that OWCP improperly relied upon evidence it received from the employing establishment which was obtained in violation of federal regulations, citing 20 C.F.R. § 10.506, which prohibits an employing establishment from contacting a claimant's treating doctor in person or by phone, but allows contacts in writing.[24] To facilitate a disabled employee's return to suitable work, an employing establishment may contact his or her physician in writing with regard to the physical limitations imposed by the effects of the industrial injury and possible job assignments.[25] The Board has never construed this regulation to prohibit contacts by an employing establishment's OIG in the course of an investigation of irregularities in a specific claim. The Board has explicitly acknowledged that it lacks authority to rule on the actions of an employing establishment.[26] The authority of the Board extends only to decisions appealed from OWCP.[27]

Appellant offers a second argument that OWCP's decision should be reversed because she was not notified that an investigation was in process concerning her claim. This misreads Board precedent because the Board has never held that OWCP or the employing establishment must notify every claimant of every investigation. OWCP has only held that it must inform the claimant if it intends to provide surveillance video evidence to a physician for the purpose of obtaining a medical opinion.[28] Given the disposition of this appeal, the Board need not reach the question of whether appellant received notice that OWCP planned to ask Dr. Alexander to consider the surveillance video in forming his opinion.

The Board reverses the termination of benefits in this case for the reasons stated.

[23] Federal (FECA) Procedure Manual, *supra* note 12.

[24] The question of whether a direct contact between the employing establishment and a treating doctor has been raised by appellant's counsel and is mentioned by the Board in its analysis but OWCP's decision was set aside on other grounds. *D.S.*, Docket No. 07-2258 (issued June 5, 2008).

[25] 20 C.F.R. § 10.506. "The employer may monitor the employee's medical progress and duty status by obtaining periodic medical reports. Form CA-17 is usually adequate for this purpose. To aid in returning an injured employee to suitable employment, the employer may also contact the employee's physician in writing concerning the work limitations imposed by the effects of the injury and possible job assignments. (However, the employer shall not contact the physician by telephone or through personal visit.) When such contact is made, the employer shall send a copy of any such correspondence to OWCP and the employee, as well as a copy of the physician's response when received. The employer may also contact the employee at reasonable intervals to request periodic medical reports addressing his or her ability to return to work." *See id.*

[26] The investigative practices of the Postal Service, OIG, are not within the jurisdiction of ECAB." *F.S.*, Docket No. 11-863 (issued September 26, 2012). *See also D.B.*, Docket No. 14-451 (issued August 12, 2014).

[27] *Margaret A. Hoskin*, 9 ECAB 186 (1956).

[28] *J.M.*, *supra* note 7.

CONCLUSION

The Board finds that OWCP improperly terminated appellant's compensation benefits effective November 3, 2012.

ORDER

IT IS HEREBY ORDERED THAT the November 2, 2012 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 26, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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