



position is inconsistent with the actual requirements of the position. He therefore contends that the medical evidence of record does not establish that appellant can return to her regular position.

Counsel also contends that OWCP and the employing establishment's investigatory practices were improper and in violation of FECA and the Board's precedent decision in *F.S.*,<sup>2</sup> by allowing the employing establishment's Office of Inspector General (OIG) to show a surveillance video to appellant's treating physician. He states that the facts of the instant case are identical to the facts in *F.S.* particularly as Dr. Holding had consistently maintained that appellant was unable to return to her regular clerk duties and that she had lifting, bending, sitting, and twisting restrictions prior to contact with OIG. Counsel notes that Dr. Holding's December 27, 2013 duty status report (Form CA-17), which OWCP relied upon to terminate appellant's compensation, does not support its termination as the report lists her continuing work restrictions. He further contends that Dr. Holding's January 3, 2014 statement entirely consists of hearsay declarations as her statement was written by an agent from OIG based on his observations of Dr. Holding viewing the videotape.

### **FACTUAL HISTORY**

This case has previously been before the Board.<sup>3</sup> In a March 25, 1999 decision, the Board reversed OWCP's October 5, 1995 and December 19, 1996 decisions which terminated appellant's compensation effective October 5, 1999 for refusal of an offer of suitable work pursuant to 5 U.S.C. § 8106(c). The Board found that there was an unresolved conflict in the medical opinion evidence between Dr. Arnold Sokol, an attending Board-certified osteopathic family practitioner, and Dr. Roy M. Lerman, a second opinion Board-certified physiatrist, as to whether appellant could perform the duties of the offered modified distribution clerk position. The facts of the case, as set forth in the prior decision, are hereby incorporated by reference. The relevant facts are set forth below.

OWCP accepted that on January 19, 1986 appellant, then a 34-year-old clerk, sustained a lumbosacral sprain and a herniated disc at L3-4 while removing bags from a bulk mail container at work.

Following the Board's March 25, 1999 decision, OWCP paid wage-loss compensation for temporary total disability and provided medical care. She was ultimately placed on the periodic rolls.

On January 23, 2014 the employing establishment advised OWCP that OIG surveillance videos had been taken from August 20, 2009 to January 3, 2014 demonstrating that appellant was physically active at the same time her physicians found that she was restricted and unable to perform routine daily activities and was totally disabled. In the video, appellant was observed running with her grandchildren, running alone in a market parking lot on a separate occasion, bending for extended periods while digging and pulling weeds in her backyard, aggressively reaching and pulling a pull cord on a lawn mower multiple times, lifting the lawn mower from

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<sup>2</sup> *F.S.*, Docket No. 11-863 (issued September 26, 2012).

<sup>3</sup> Docket No. 97-1400 (issued March 25, 1999).

the ground, loading and unloading groceries, bending and reaching from a cart, and unloading the cart at her car.

The investigative report included, among other things, an interview memorandum dated December 27, 2013 and signed by Dr. Holding and a witness on January 3, 2014. The OIG agent who conducted the interview also signed the memorandum, under penalty of perjury, that Dr. Holding's statement was given to him on the same day. Dr. Holding was shown highlights of the investigative surveillance videos by OIG agents. She provided a history of her treatment of appellant's back condition. Dr. Holding noted that appellant complained about back pain that radiated to her legs and her pain had been consistent throughout her office visits without improvement. She noted that appellant's pain kept her from work. Appellant advised Dr. Holding that she was only physically able to wash dishes, wash one load of laundry, and vacuum for 15 minutes. Based on her review of the surveillance video, however, Dr. Holding advised that appellant's condition had not been consistent with what she had viewed on the video. She showed no restriction while lifting, bending, lifting a lawn mower, and running. Dr. Holding concluded that appellant was "able to return to her normal position as a clerk with the [employing establishment] without restriction."

In a December 27, 2013 Form CA-17 report, Dr. Holding reiterated that appellant had sustained lower back pain and lumbar radiculopathy due to the January 19, 1986 employment injuries. On that form she further reported that appellant was capable of performing her full-time regular manual clerk work, 8 hours a day with restrictions which included lifting up to 75 pounds intermittently for 6 hours, sitting intermittently 30 minutes, standing, bending, pushing, pulling, reaching above the shoulder, and operating a mail sorting machine 1 hour, and walking 2 hours a day.

By letter dated April 3, 2014, OWCP notified appellant that it proposed to terminate her wage-loss compensation benefits based on Dr. Holding's December 27, 2013 medical opinion.<sup>4</sup> It afforded appellant 30 days to submit additional evidence or argument if she was in disagreement with the proposed action.

In an April 29, 2014 letter, counsel disagreed with the proposed termination of benefits. He suggested that any evidence that was procured by an OIG visit with appellant's attending physician should not be used against her to terminate her compensation benefits. Counsel cited the Board's decision in *F.S.*<sup>5</sup> He also contended that Dr. Holding's previous medical records indicated that she agreed appellant had limitations regarding appellant's ability to return to her clerk position.

Counsel requested a copy of the physical evidence obtained or produced during the OIG investigation. By letter dated May 22, 2014, OWCP informed appellant's counsel that it would provide him with the investigative discs that the employing establishment's OIG had provided to appellant's treating physician.

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<sup>4</sup> The Board notes that OWCP's August 21, 2014 notice only addressed the proposed termination of appellant's wage-loss compensation benefits. It did not address her right to receive medical benefits under FECA.

<sup>5</sup> *F.S.*, *supra* note 2.

On May 27, 2014 OWCP again notified appellant that it proposed to terminate her wage-loss compensation benefits based on Dr. Holding's medical opinion.

By letter dated August 1, 2014, OWCP sent the OIG's surveillance compact discs which covered the period 2009 to 2011 and 2013 for counsel's review. He was afforded 15 days to submit comments or explanation on the accuracy of the images. Appellant was copied on the August 1, 2014 correspondence.

In an August 21, 2014 decision, OWCP terminated appellant's wage-loss compensation effective that day. It found that she had failed to submit any evidence to counter the weight accorded to Dr. Holding's opinion that she no longer had any disability due to her accepted January 19, 1986 employment-related injuries.

By letter dated September 2, 2014, appellant, through counsel, requested an oral hearing before an OWCP hearing representative. In a December 4, 2014 letter, counsel requested that the request for an oral hearing be changed to a request for a review of the written record.

In a February 20, 2015 decision, an OWCP hearing representative affirmed the August 21, 2014 decision terminating appellant's wage-loss compensation. He found that the weight of the medical evidence regarding this matter continued to rest with the opinion of Dr. Holding.

### **LEGAL PRECEDENT**

Once OWCP has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.<sup>6</sup> It may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.<sup>7</sup> OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>8</sup>

### **ANALYSIS**

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation effective August 21, 2014.

OWCP accepted that appellant sustained a lumbar sprain and herniated disc at L3-4 while in the performance of duty on January 19, 1986. It terminated her wage-loss compensation effective August 21, 2014 as she no longer had any disability causally related to the accepted employment injuries. OWCP based its termination on the opinion of Dr. Holding, an attending Board-certified physiatrist. The Board finds, however, that Dr. Holding's opinion is insufficient

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<sup>6</sup> *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

<sup>7</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

<sup>8</sup> *J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

to meet OWCP's burden of proof to establish that appellant no longer had any employment-related disability.

Dr. Holding, in her December 27, 2013 Form CA-17 report, found that appellant had lower back pain and lumbar radiculopathy due to the January 19, 1986 employment injuries. In the December 27, 2013 report she further found that appellant could perform her regular clerk duties, eight hours a day. She then noted appellant's limitations, which included lifting up to 75 pounds intermittently 6 hours, sitting intermittently 30 minutes, standing, bending, pushing, pulling, reaching above the shoulder, and operating a mail sorting machine 1 hour, and walking 2 hours a day. However, to be of probative value, a physician's opinion must be one of reasonable medical certainty.<sup>9</sup> Dr. Holding's opinion as to whether appellant had any continuing employment-related residuals is equivocal in nature and not to a reasonable degree of medical certainty. Moreover, she failed to provide any medical rationale to support her opinion that appellant could return to work with no restrictions due to the employment injuries. Dr. Holding did not relate her diagnosed lumbar radiculopathy condition to the accepted January 19, 1986 lumbar sprain and herniated disc at L3-4 at issue in the present case.<sup>10</sup> The Board has consistently held that a medical opinion not fortified by rationale is of limited probative value.<sup>11</sup> The Board therefore finds that OWCP has failed to meet its burden of proof to terminate appellant's wage-loss compensation effective August 21, 2014 based on Dr. Holding's opinion. It does not establish that her employment-related residuals and disability had ceased.

On appeal, counsel contends that OWCP violated FECA and the Board's decision in *F.S.*,<sup>12</sup> by allowing the employing establishment's OIG to show a surveillance video to appellant's treating physician. As the Board has already found that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation effective August 21, 2014, it is unnecessary to address these further contentions.

### CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation effective August 21, 2014.

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<sup>9</sup> See *Beverly R. Jones*, 55 ECAB 411 (2004).

<sup>10</sup> Where a claimant claims that a condition not accepted or approved by OWCP was due to an employment injury, the claimant bears the burden of proof to establish that the condition is causally related to the employment injury through the submission of rationalized medical evidence. *T.M.*, Docket No. 08-975 (issued February 6, 2009).

<sup>11</sup> *A.D.*, 58 ECAB 149 (2006).

<sup>12</sup> *F.S.*, *supra* note 2.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 20, 2015 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 10, 2016  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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