



residuals of his accepted employment injuries after that date; and (2) whether appellant met his burden of proof to establish residuals of his accepted employment injuries after September 21, 2014.

### **FACTUAL HISTORY**

On January 16, 1984 appellant, then a 31-year-old assistant dam operator and maintenance worker, filed a traumatic injury claim (Form CA-1) alleging that on January 13, 1984 he sustained injury while lifting a 50-pound access plate cover into place on the end of a vent pipe. OWCP accepted appellant's claim for lumbar sprain, herniated disc at L4-5, and pathological vertebra fracture. Appellant stopped work on January 16, 1984 and returned to work for the employing establishment on March 5, 1984.<sup>3</sup>

On January 5, 1990 appellant underwent an L4-5 discectomy and right-sided L4 and L5 foraminotomies. On July 6, 1992 he underwent a complete L4 laminectomy, bilateral L5 decompression and foraminotomies, and revision lumbar discectomy. These surgical procedures were authorized by OWCP.

Appellant returned to work for the employing establishment as a water treatment plant operator in August 1994. OWCP accepted that on June 6, 1996 he sustained a lumbosacral strain, recurrent herniated disc at L4-5, and discogenic collapse at L4-5 due to a fall from a ladder at work. Appellant has not worked since June 6, 1996.<sup>4</sup>

Appellant received treatment for his back and lower extremity conditions from several attending physicians. In a February 27, 2009 form report, Dr. Jennifer de la Rosa, an attending Board-certified family practitioner and osteopath, provided an opinion that appellant was totally disabled from all work for his "lifetime." She noted that appellant complained of persistent back pain and diagnosed several conditions, including lumbosacral sprain and intervertebral disc disorder.

The record contains a May 13, 2013 investigator activity summary produced by the employing establishment's FECA Fraud Investigations Unit. The memorandum documents various activities of appellant, including activities observed on each day between April 11 and 15, 2013. For example, on April 11, 2013 an investigator reported that appellant was observed driving in a pickup truck to an automotive supply store, carrying a battery purchased from the store, and leaning over to place it in the bed of his truck. On April 15, 2013 the investigator reported that appellant was observed driving various places in his truck and later driving a motorcycle with a passenger. Surveillance video of appellant's activities was procured by the investigator.<sup>5</sup>

---

<sup>3</sup> Appellant stopped work at the employing establishment in late-1984 and worked in the private sector from November 1984 to February 1992. His January 14, 1984 injury was accepted under File No. xxxxxx054, but this case file has been doubled into the present case File No. xxxxxx900.

<sup>4</sup> Appellant received disability compensation on the periodic rolls beginning June 16, 2002.

<sup>5</sup> Documents in the record indicate that in May 2013 surveillance videos were added to the case record in DVD format, but the case record does not contain such videos at the present time.

In a May 13, 2013 letter to OWCP, an official from the employing establishment's FECA Fraud Investigations Unit discussed the contents of the May 13, 2013 investigator activity summary and recommended that appellant be sent to an OWCP referral physician for an examination.

In March 2014 OWCP referred appellant to Dr. Robert A. Smith, a Board-certified orthopedic surgeon, for a second opinion examination and opinion regarding his capacity to work and the existence of residuals of his January 13, 1984 and June 6, 1996 employment injuries.<sup>6</sup>

In an April 15, 2014 report, Dr. Smith detailed appellant's factual and medical history and reported the findings of the physical examination he conducted on that date.<sup>7</sup> He noted that, upon examination of appellant's back, there was no finding of any atrophy, spasm, trigger points, or deformity. Appellant had satisfactory range of spine motion and his neurologic examination was intact, except for some mild atrophy in the left calf. Dr. Smith found that there was no present clinical finding of a lumbar sprain, herniated disc, or vertebra fracture, noting that appellant previously received surgical treatment. He determined that a magnetic resonance imaging (MRI) scan from 2010 did not reveal any recurrent or residual disc at the L4-3 level, or any pathological fracture of any vertebra in the lumbar area. Dr. Smith opined that the medical findings showed that the recurrent lumbar sprain from 1996 had resolved without any residual. He indicated, "Given the surveillance material, it also appears that [appellant] has greater capacity for activities than he seems to reveal with respect to his history and complaints of chronic low back pain at this time." Dr. Smith found that appellant had work restrictions which were necessitated by his nonwork-related cervical condition, and noted that "any number of light- or medium-duty positions would be appropriate in the context of his relatively benign examination and the findings mentioned during his surveillance in 2013."<sup>8</sup>

By letter dated June 25, 2014, OWCP advised appellant that it proposed to terminate his wage-loss compensation and medical benefits because he ceased to have residuals of his January 13, 1984 and June 6, 1996 employment injuries. It noted that this proposed action was justified by the well-rationalized April 15, 2014 report of Dr. Smith, OWCP's referral physician. Appellant was provided 30 days to submit evidence and argument challenging the proposed termination action.

In a July 9, 2014 letter, counsel requested that OWCP provide a complete copy of appellant's case record.

---

<sup>6</sup> Dr. Smith was provided the case record which included the May 13, 2013 investigator activity summary produced by the employing establishment's FECA Fraud Investigations Unit and the accompanying surveillance videos.

<sup>7</sup> In the "History of Present Illness" portion of his report, Dr. Smith noted, "Interestingly, [appellant] underwent some surveillance in April 2013. It appears that on April 11, 2013 [appellant] was able to drive his truck to a battery warehouse in Eastern Maryland, buy a battery, and then carry it to his truck. In doing so he leaned over and placed the battery in the bed of his truck. [Appellant] was also observed on April 15, 2013, riding a motorcycle with a passenger on the back."

<sup>8</sup> Dr. Smith completed a work restrictions form on April 15, 2014 noting that appellant could work on a full-time basis with restrictions such as lifting, pushing, or pulling no more than 20 pounds.

In a July 24, 2014 letter, counsel argued that there was a conflict in the medical opinion evidence between Dr. Smith and appellant's attending physicians regarding whether appellant continued to have residuals of his January 13, 1984 and June 6, 1996 employment injuries. She also argued that appellant was denied due process by not being given an opportunity to view the surveillance materials which were provided to Dr. Smith before rendering his opinion. Counsel asserted that, since appellant was not made aware that Dr. Smith was provided the surveillance materials and he was not provided a copy of them to review their accuracy, OWCP may not rely upon the opinion provided by Dr. Smith in his April 15, 2014 report in terminating appellant's wage-loss compensation and medical benefits.

Appellant submitted several medical reports from 2013 and 2014 discussing the treatment of his back and lower extremity conditions. In a form report dated July 24, 2014, Dr. Patrick Callahan, an attending Board-certified anesthesiologist, diagnosed lumbar disc degeneration, spondylosis, Schmorl's nodes of the lumbar region, and L4-5 disc obliteration. He indicated that appellant was totally disabled from work.<sup>9</sup>

In a September 16, 2014 decision, OWCP terminated appellant's wage-loss compensation and medical benefits effective September 21, 2014 based on the opinion of Dr. Smith. It found that Dr. Smith provided a well-rationalized opinion that appellant ceased to have residuals of his January 13, 1984 and June 6, 1996 employment injuries.

In an October 2, 2014 letter to OWCP, counsel asserted that the case record OWCP provided to appellant in response to the July 9, 2014 request appeared to be incomplete as it did not contain records of the video surveillance provided to Dr. Smith prior to his April 15, 2014 examination. She requested that OWCP provide a copy of this video surveillance.

In an October 7, 2014 letter, OWCP advised that it was providing counsel and appellant with the requested video surveillance materials, noting in the letter, "[E]nclosed are all investigative DVDs on file."

Appellant submitted an affidavit, signed on May 6, 2015, in which he stated that he did not become aware that Dr. Smith was provided with surveillance video of him until after he attended the second opinion examination on April 15, 2014.

In a May 15, 2015 letter, appellant, through counsel, requested reconsideration of OWCP's September 16, 2014 termination decision. Counsel argued that the opinion of Dr. Smith was tainted because OWCP failed to advise appellant prior to the April 15, 2014 examination that Dr. Smith would be provided with surveillance video of his activities. She also argued that Dr. Smith did not adequately explain why appellant ceased to have employment-related residuals. Moreover, counsel asserted that the reports of appellant's attending physicians created a conflict in the medical opinion evidence which necessitated referral of appellant for an impartial medical examination.

---

<sup>9</sup> Appellant also resubmitted reports previously of record including the February 27, 2009 form report of Dr. de la Rosa.

Appellant submitted a March 19, 2015 report in which Dr. Brian R. Subach, an attending Board-certified orthopedic surgeon, posited that he remained totally disabled from work as a direct result of his 1984 and 1996 employment injuries and the 1990 and 1992 surgeries performed to treat those injuries. Dr. Subach discussed appellant's limitation of back motion and indicated that he was unable to sit or stand for any extended period of time. He recommended that appellant be given the additional diagnoses of lumbar postlaminectomy syndrome, lumbar radiculopathy, and sacroiliitis which resulted from the surgical treatment of his injuries. Dr. Subach noted, "Based upon my review of the medical records, the imaging studies available, and my examination today it [is] my medical opinion to a reasonable degree of medical probability that the resulting impact of the work[-]related injuries has caused the patient permanent disability. This disability arises both from the injuries and the surgical interventions."

By decision dated August 13, 2015, OWCP denied modification of its September 16, 2014 decision terminating appellant's wage-loss compensation and medical benefits effective September 21, 2014. It found that Dr. Smith provided a well-rationalized opinion that appellant ceased to have residuals of his January 13, 1984 and June 6, 1996 employment injuries and that the provision of the surveillance videos to Dr. Smith did not taint his opinion.<sup>10</sup> OWCP also considered the medical evidence appellant submitted after this termination action, including the reports of Dr. Subach, and found that he did not meet his burden of proof to establish residuals of his accepted employment injuries after September 21, 2014.

### **LEGAL PRECEDENT -- ISSUE 1**

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 his or her employment, OWCP may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.<sup>11</sup> OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>12</sup> 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 must establish that a claimant no longer has residuals of an employment-related condition that requires further medical treatment.<sup>13</sup>

OWCP procedures provide that if a surveillance video of a claimant has been submitted by the employing establishment or an investigative agency, and OWCP's claims examiner has determined that this evidence should be incorporated as part of the case record and is germane to

---

<sup>10</sup> OWCP indicated, "It also has to be noted here that [appellant], also, did not respond to the content of the surveillance, except to say that you did n[o]t know about it before it was provided to Dr. Smith. Counsel argues this as a basis for reversal or modification of the reconsideration decision but there is no precedent for that, and counsel does not actually suggest that there is one. Additionally, no one has suggested that the description of the surveillance video is inaccurate."

<sup>11</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989).

<sup>12</sup> *Del K. Rykert*, 40 ECAB 284 (1988).

<sup>13</sup> *Mary A. Lowe*, 52 ECAB 223 (2001).

issues being addressed by the second opinion specialist, the claims examiner should direct the specialist to review the video evidence and reference it in his or her report. Its procedures provide that, if video evidence is submitted directly to a specialist prior to claims examiner review, the claims examiner should request a copy of the video from the employing establishment. If the employing establishment does not provide the video to OWCP, the claims examiner should direct the specialist to disregard the video evidence. OWCP procedures further provide that, once a surveillance video is provided to OWCP with a request that it be used in the management of the case, it becomes part of the official case record and a copy will be released to the claimant, if he or she requests it, just like any other portion of the case record. Its procedures make reference to *J.M.*,<sup>14</sup> a case in which the Board held that, if the claimant requests a copy of surveillance video, one should be made available and the claimant given a reasonable opportunity to offer any comment or explanation regarding the accuracy of the recording.<sup>15</sup>

In *A.P.*,<sup>16</sup> the Board considered the termination of a claimant's wage-loss compensation based on the report of an attending physician who had been provided video surveillance of her physical activities. The Board noted that it disfavors investigative evidence that is presented for the purpose of obtaining an adverse medical opinion, but is not disclosed to the injured worker. The Board indicated that, although video footage may be of some value to a physician asked to render a medical opinion, it may also be misleading if material facts are omitted. The Board noted that, when video footage is given to a physician and the claimant has requested a copy of the video footage, OWCP is obliged to provide a copy of the recording and a reasonable opportunity to respond to its accuracy. The Board reversed OWCP's termination of the claimant's wage-loss compensation, noting that the claimant was not provided a reasonable opportunity to respond to the accuracy of the video footage which had been provided to the physician.<sup>17</sup>

### **ANALYSIS -- ISSUE 1**

OWCP accepted that on January 13, 1984 appellant sustained a lumbar sprain, herniated disc at L4-5, and pathological vertebra fracture. On January 5, 1990 appellant underwent an L4-5 discectomy and right-sided L4 and L5 foraminotomies. On July 6, 1992 he underwent a complete L4 laminectomy, bilateral L5 decompression and foraminotomies, and revision lumbar discectomy. These surgical procedures were authorized by OWCP. It was also accepted that on June 6, 1996 appellant sustained a lumbar strain, recurrent herniated disc at L4-5, and discogenic collapse at L4-5. OWCP terminated appellant's wage-loss compensation and medical benefits effective September 21, 2014 based on the April 15, 2014 report of Dr. Smith, an OWCP referral physician. Prior to his April 15, 2014 examination of appellant, OWCP provided Dr. Smith a

---

<sup>14</sup> 58 ECAB 478 (2007).

<sup>15</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.9 (September 2010).

<sup>16</sup> Docket No. 13-0030 (issued March 18, 2013).

<sup>17</sup> See also *R.B.*, Docket No. 15-0420 (issued August 10, 2015) (citing the *A.P.* case and its principle that, upon request, a claimant should be provided a reasonable opportunity to respond to the accuracy of video surveillance materials provided to a physician).

copy of the case record which included a May 13, 2013 investigator activity summary produced by the employing establishment's FECA Fraud Investigations Unit, as well as accompanying surveillance videos from April 2013.

In his April 15, 2014 report, Dr. Smith determined that appellant ceased to have residuals of his January 13, 1984 and June 6, 1996 employment injuries. He discussed the surveillance records provided to him by OWCP and noted, "Given the surveillance material, it also appears that [appellant] has greater capacity for activities than he seems to reveal with respect to his history and complaints of chronic low back pain at this time." Dr. Smith found that appellant had work restrictions which were necessitated by his nonwork-related cervical condition, and indicated that "any number of light- or medium-duty positions would be appropriate in the context of his relatively benign examination and the findings mentioned during his surveillance in 2013."

The Board finds that OWCP improperly relied on the April 15, 2014 report of Dr. Smith in terminating appellant's wage-loss compensation and medical benefits effective September 21, 2014. Dr. Smith's April 15, 2014 report was tainted by OWCP's failure to provide appellant a reasonable opportunity to respond to the accuracy of the video surveillance materials provided to Dr. Smith. Prior to OWCP's termination of wage-loss compensation and medical benefits, appellant requested a copy of the case record including video surveillance materials which were provided to Dr. Smith. OWCP did not provide appellant the video surveillance materials until after his wage-loss compensation and medical benefits were terminated effective September 21, 2014, an action which was based on the April 15, 2014 report of Dr. Smith. Consequently, appellant was denied a reasonable opportunity to offer any comment or explanation regarding the accuracy of the video surveillance materials.<sup>18</sup> As noted above, when video footage is given to a physician and the claimant has requested a copy of the video footage, OWCP is obliged to provide a copy of the recording and a reasonable opportunity to respond to its accuracy.<sup>19</sup> As appellant was not provided a reasonable opportunity to respond, OWCP did not meet its burden of proof to terminate his wage-loss compensation and medical benefits effective September 21, 2014.<sup>20</sup>

### CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective September 21, 2014 because he had no residuals of his accepted employment injuries after that date.<sup>21</sup>

---

<sup>18</sup> See *supra* notes 14 and 15.

<sup>19</sup> See *supra* notes 16 and 17.

<sup>20</sup> See *id.*

<sup>21</sup> Given the Board's disposition of the first issue of this case, it is not necessary for the Board to consider the second issue.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 13, 2015 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 26, 2016  
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

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