

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

P.M., Appellant

and

**U.S. POSTAL SERVICE, NORTHGATE
STATION, El Paso, TX, Employer**

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**Docket No. 16-1321
Issued: January 10, 2017**

Appearances:

*Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On June 13, 2016 appellant, through counsel, filed a timely appeal from an April 29, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

ISSUE

The issues are: (1) whether OWCP properly terminated appellant's wage-loss compensation, effective July 29, 2015, as she was no longer disabled from her usual

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

employment; and (2) whether appellant met her burden of proof to establish continuing disability after July 29, 2015.

On appeal counsel argues that OWCP's decision is contrary to facts and law.

FACTUAL HISTORY

On January 3, 2011 appellant, then a 44-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on December 31, 2010 she tripped on a wooden reindeer and landed on her right elbow and then left knee while delivering mail. On February 15, 2011 OWCP accepted her claim for sprain of unspecified sites, left knee and leg. Appellant stopped work on March 26, 2011. She received compensation benefits on the supplemental rolls as of April 10, 2011. Appellant's claim was later accepted for left knee derangement of meniscus.

Appellant underwent multiple authorized surgeries on her left knee. On March 23, 2011 Dr. David Mansfield, a Board-certified orthopedic surgeon, performed a left knee arthroscopic partial medial meniscectomy and on November 28, 2012, he performed a repeat left knee arthroscopic partial medial meniscectomy. On January 24, 2014 Dr. Eric Sides, a Board-certified orthopedic surgeon, completed another left knee arthroscopic partial medial meniscectomy surgery and on December 2, 2014 he completed a left knee arthroscopy with debridement of the medial meniscal tear.

Appellant was referred for evaluation by OWCP to a second opinion physician, Dr. Joshua Herzog, a Board-certified orthopedic surgeon, to determine her current disability status. In a report dated April 15, 2014, Dr. Herzog related appellant's history of injury and reviewed various diagnostic studies. He noted that she continued to have pain in her left knee over the medial joint line, with positive McMurray's test, good left knee range of motion, and no joint effusion or instability of the left knee. Dr. Herzog explained that appellant was status post two left knee partial medial meniscectomies, and had now developed osteoarthritis confirmed by the most recent magnetic resonance imaging (MRI) scan dated November 15, 2013. He completed a work capacity evaluation form (OWCP-5c) indicating that appellant could not perform her usual work, but could return to work full time, with restrictions including no squatting, kneeling, or climbing.

OWCP received a March 10, 2015 report from the employing establishment's Office of Inspector General. This report related that surveillance of appellant revealed extensive activity on the part of appellant. The investigator provided a synopsis of the video, and noted that appellant was observed on several occasions as she drove to and from local restaurants, stores, office buildings, and other businesses, and that during these activities she was observed walking to and from her car, walking across parking lots, stepping up and off curbs, and carrying groceries and pet food items without a shopping cart. He noted that at no time did it appear that appellant was utilizing the assistance of braces or other assistive devices to aid in her ability to walk. The investigator noted that on the day of appellant's second opinion examination, she left her residence with a pronounced limp and was driven by an acquaintance, but that during surveillance activities conducted later that same afternoon, appellant's limp was no longer noticeable and that she appeared to walk with very little difficulty.

A June 8, 2015 handwritten note without letterhead, allegedly written by Dr. Sides, but containing an illegible signature, indicated that he was turning over the function of attending physician to Dr. Richard Westbrook, a Board-certified orthopedic surgeon. By letter dated June 17, 2015, OWCP informed appellant that it had received the June 8, 2015 note. It observed that the note was not on Dr. Sides' letterhead, it contained no explanation for discontinuing treatment, and that the signature was illegible. OWCP concluded that the note was written by appellant. It denied appellant's request to treat with Dr. Westbrook, and that she remained under the care of Dr. Sides.

In a June 9, 2015 report, Dr. Westbrook indicated that appellant presented with pain and swelling on the left side and stated that her symptoms had been chronic. He noted appellant's complaints that her symptoms were moderately severe and occurred continuously. Dr. Westbrook diagnosed pain in lower leg, joint, traumatic arthritis of left knee, derangement of meniscus, and sprain and strain of unspecified site of knee and leg. He listed his impressions and noted that appellant continued to have significant left knee pain which had not been helped by injections, medication, physical therapy, or anti-inflammatory drugs. Dr. Westbrook noted that appellant was awaiting approval for a total knee replacement on the left side. In an accompanying duty status report, he indicated that appellant was unable to perform any employment duties due to her left knee injury.

In a June 17, 2015 report, Dr. Sides noted that appellant was post left knee arthroscopic medial meniscal debridement. He listed his impression as derangement of meniscus, not otherwise classified, osteoarthritis, unspecified lower leg, and tear medial meniscus of the knee. Dr. Sides opined that, after reviewing the surveillance video of appellant, it was clear that she was more than capable of completing the tasks required for her regular duty. Therefore, he released her to regular duty and indicated that she should be placed at maximum medical improvement.

On June 25, 2015 OWCP proposed to terminate appellant's wage-loss compensation as she no longer had any disability from work stemming from her work injury or illness.

On July 6, 2015 OWCP officially denied appellant's request to change physicians. It noted that Dr. Sides was a qualified, Board-certified orthopedic surgeon who specialized in knee osteoarthritis, knee surgery, and knee replacement arthroplasty. OWCP found that the record supported that appellant received appropriate treatment from Dr. Sides. Accordingly, it concluded that the evidence of record demonstrated that she was under the care of a qualified specialist and her treatment had been appropriate.

In a July 7, 2015 report, Dr. Westbrook diagnosed traumatic arthritis of left knee, derangement of meniscus, not otherwise classified, and sprain and strain of unspecified site of knee and leg. He noted that appellant continued to have increasing left knee pain and was waiting for approval to proceed with surgical intervention for knee replacement. Dr. Westwood reiterated in a work capacity evaluation that she could not work.

On July 13, 2015 appellant, through counsel, requested an oral hearing before an OWCP hearing representative regarding the July 6, 2015 denial of appellant's request to change treating physicians.

In a July 20, 2015 narrative statement, appellant indicated that she disagreed with the proposed termination of her benefits. She contended that she had not refused any job offers, that she had been in compliance with instructions, that Dr. Sides' January 24, 2014 operative report stated that the tear was inoperable, and that Dr. Sides demonstrated unethical behavior by negligently shredding her operative pictures from the December 2, 2014 surgery. Appellant argued that she was entitled to a second opinion from Dr. Westbrook.

By decision dated July 28, 2015, OWCP terminated appellant's wage-loss compensation benefits effective July 29, 2015 as it determined that she was no longer disabled as a result of her accepted injury or illness pursuant to the opinion of Dr. Sides. It did not terminate appellant's medical benefits.

On August 4, 2015 appellant, by counsel, requested a telephonic hearing before an OWCP hearing representative regarding the July 28, 2015 decision terminating her wage-loss compensation benefits.

By letter dated August 5, 2015, counsel contended that OWCP never provided a copy of the surveillance video to appellant or himself, and that the referral of the video to Dr. Sides was improper. Accordingly, he contended that the termination of benefits was improper. Counsel also requested a copy of the video.

In an August 18, 2015 report, Dr. Westbrook diagnosed traumatic arthritis of the left knee and effusion of the lower leg joint. He referred appellant to physical therapy. Dr. Westbrook noted that appellant was still awaiting approval for her left knee replacement.

On August 28, 2015 OWCP issued a schedule award for two percent permanent impairment of the left lower extremity.

By letter dated September 14, 2015, OWCP forwarded a copy of the surveillance video to counsel.

At the hearing held on February 29, 2016, appellant indicated that she wanted Dr. Westbrook to be her treating physician. She noted complaints regarding Dr. Sides' physical examinations. Appellant contended that Dr. Westbrook provided more thorough examinations. Counsel argued that OWCP should not force a claimant to see a doctor whom she does not feel provided proper level of care. He also noted that there was an outstanding request to add traumatic arthritis to the claim.

By decision dated April 4, 2016, OWCP formally denied appellant's request to transfer medical care. It noted that its prior letters with regard to the transfer of medical care did not contain appeal rights. OWCP determined that the record did not support transfer of care to Dr. Westbrook.³

³ Counsel did not appeal this decision.

By decision dated April 29, 2016, OWCP affirmed the July 28, 2015 termination decision, finding that the evidence of record documented appellant's ability to return to her full-time regular duty effective July 29, 2015.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.⁴ Having determined that an employee has a disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.⁵

ANALYSIS -- ISSUE 1

OWCP accepted appellant's claim for sprain of left knee and leg, and later accepted her claim for left knee derangement of meniscus. The Board finds that OWCP met its burden of proof to justify termination of appellant's wage-loss benefits effective July 29, 2015.

OWCP based its termination decision on the opinion of appellant's treating physician, Dr. Sides. Dr. Sides performed two surgeries on appellant, *i.e.*, a January 24, 2014 left knee arthroscopic partial medial meniscectomy and a December 2, 2014 left knee arthroscopy with debridement of the medial meniscal tear surgery. In a June 17, 2015 report, Dr. Sides listed his impression as derangement of meniscus, not otherwise classified, osteoarthritis of left lower leg, and tear medial meniscus of knee. He opined that, after reviewing the surveillance video of appellant, it was clear that appellant was more than capable of completing the tasks required for her regular duty. The Board has reviewed the opinion of Dr. Sides and finds that it has reliability, probative value, and convincing quality with respect to its conclusions regarding the relevant issue in the present case.⁶ The opinion of Dr. Sides is based on a proper factual and medical history, his treatment of appellant, and a review of the surveillance video.⁷ He provided medical rationale for his opinion that appellant no longer had a disability from her accepted work condition. Dr. Sides noted that, based on the symptoms and activities appellant performed in the surveillance video, it was clear that she was more than capable of completing the tasks required for her regular duty. Therefore, he released appellant to regular-duty work. The Board finds that the opinion of Dr. Sides constitutes the weight of the medical evidence and is sufficient to justify OWCP's termination of benefits for the accepted conditions.

In his June 9, 2015 report, Dr. Westbrook assessed appellant with pain in lower leg, joint; traumatic arthritis of the left knee; derangement of the meniscus; and sprain and strain of the left knee and leg. He noted that appellant had continuing residuals and noted in duty status reports that appellant was unable to do any work. However, Dr. Westbrook did not provide a well-

⁴ *M.B.*, Docket No. 15-1125 (issued September 14, 2016).

⁵ *Id.*; *Jason C. Armstrong*, 40 ECAB 907 (1989).

⁶ *See D.D.*, Docket No. 15-1075 (issued March 15, 2016).

⁷ *See Melvina Jackson*, 38 ECAB 443 (1987).

rationalized opinion explaining this conclusion. He did not explain how appellant's diagnosed conditions, including her left knee arthritis, were causally related to the accepted employment incident. Furthermore, Dr. Westbrook did not explain why any of appellant's diagnosed conditions would cause continuing disability from her usual employment. Accordingly, the report of Dr. Westbrook is of diminished value.⁸

Counsel contended that OWCP improperly used the surveillance video. The Board has previously held 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. Thus, OWCP is obliged to notify the claimant when such footage is given to a physician and, upon request, provide a copy of the recording and a reasonable opportunity to respond to its accuracy.⁹ Appellant was made aware of the surveillance video and the fact that Dr. Sides had reviewed this video at least by the time of the notice of proposed termination, issued on June 25, 2015. He did not request a copy of the surveillance video prior to the July 28, 2015 decision terminating her benefits. By letter dated August 5, 2015, counsel requested a copy of the surveillance tape and this was timely sent to him on September 14, 2015. The Board notes that counsel was provided a copy of the video prior to the decision of the hearing representative affirming the termination of compensation benefits. There is no evidence of any wrongdoing on the part of OWCP with regard to the video.¹⁰

LEGAL PRECEDENT -- ISSUE 2

After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative, and substantial evidence that he or she had an employment-related disability which continued after termination of compensation benefits.¹¹

ANALYSIS -- ISSUE 2

Following termination of appellant's compensation benefits, counsel submitted an August 8, 2015 report by Dr. Westbrook wherein he reiterated his diagnoses of traumatic arthritis of the left knee and effusion of the lower leg joint, and noted that appellant was awaiting approval for her left knee replacement. The August 8, 2015 opinion of Dr. Westbrook is deficient to establish continuing disability after July 29, 2015 for the same reason as his prior reports, *i.e.*, he did not provide a rationalized opinion explaining why appellant had continuing disability causally related to her accepted condition. Accordingly, the Board finds that appellant

⁸ See V.A., Docket No. 15-1073 (issued November 25, 2015).

⁹ A.P., Docket No. 13-30 (issued March 18, 2013); *see also* Y.S., Docket No. 15-1949 (issued April 11, 2016).

¹⁰ See N.M., Docket No. 15-1553 (issued March 2, 2016).

¹¹ M.B., Docket No. 15-1125 (issued September 14, 2016).

has failed to meet her burden of proof to establish continuing disability after the termination of benefits.¹²

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP properly terminated appellant's wage-loss compensation effective July 29, 2015. The Board further finds that appellant did not meet her burden of proof to establish continuing disability after July 29, 2015.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 29, 2016 is affirmed.

Issued: January 10, 2017
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

¹² See *G.G.*, Docket No. 15-0985 (issued August 21, 2015).