

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

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M.S., Appellant )

and )

DEPARTMENT OF AGRICULTURE, )  
U.S. FOREST SERVICE, Albuquerque, NM, )  
Employer )

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**Docket No. 17-1181**  
**Issued: November 14, 2017**

*Appearances:*  
*Appellant, pro se*  
*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  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On April 21, 2017 appellant, through counsel, filed a timely appeal from a December 27, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss compensation benefits, effective December 28, 2016, as he no longer had residuals or disability due to his accepted lumbar and left hip conditions.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On November 21, 2013 appellant, then a 48-year-old forestry technician, filed an occupational disease claim (Form CA-2) alleging that he sustained back problems as a result of his federal employment duties. He first became aware of his condition on August 3, 2010 and realized it resulted from his employment on August 10, 2010. OWCP accepted appellant's claim for lumbar degenerative disc disease and left hip sprain.

Appellant stopped work on October 24, 2013 and filed various claims for wage-loss compensation (Form CA-7). OWCP paid medical and wage-loss compensation benefits on the supplemental rolls from October 24, 2013 through March 8, 2014. It placed appellant on the periodic rolls effective March 9, 2014.

On April 9, 2014 appellant underwent left hip arthroscopy with debridement of labrum surgery.

OWCP referred appellant's case, along with a statement of accepted facts (SOAF) and a copy of the record, to Dr. Kirpal S. Sidhu, a Board-certified orthopedic surgeon and second opinion examiner, on April 11, 2016 to determine whether he still suffered residuals and remained disabled due to his work-related injury.

On April 11, 2016 OWCP issued a letter to appellant and his then-counsel informing him that an appointment was made for him to obtain a second opinion assessment of his work-related condition. It also notified him that a surveillance video for the dates April 27, 30, May 15 to 16, and June 24 to 26, 2015 was being sent to the physician for review as part of his second opinion evaluation.

In a May 6, 2016 report, Dr. Sidhu indicated that he had reviewed the SOAF and appellant's history. He discussed appellant's employment duties as a forestry technician and his medical records. Dr. Sidhu noted that appellant's left hip had improved, but he still complained of worsening lower back pain radiating down the right lower extremity. Upon physical examination of appellant's cervical spine, he reported tenderness in the right transverse processes and brachial plexus. Deep tendon reflexes were positive on both sides. Dr. Sidhu indicated that examination of appellant's thoracic lumbar spine showed tenderness in the L5 spinous process and in the lower lumbar paraspinal muscles. He provided range of motion findings and subjective sensation dullness in appellant's right foot and leg. Examination of appellant's left hip showed mild tenderness in the muscle of the upper lateral thigh. Dr. Sidhu diagnosed degenerative disc disease of the lumbar spine, spondylolisthesis at L5-S1 with status post left hip surgery, right shoulder post rotator cuff repair, and left shoulder impingement decompression, well functioning.

Dr. Sidhu reported that appellant's left hip condition had resolved and that appellant reached maximum medical improvement (MMI) at 12 weeks from the date of injury. He noted that appellant's accepted degenerative disc condition at L4-5 was still present, although it was just "part of a generalized degenerative disc disease of [the] spine." Dr. Sidhu noted that the July 9, 2015 lumbar spine computerized tomography (CT) myelogram report confirmed objective findings of L4-5 degenerative disc disease. He explained that appellant's degenerative

disc disease was “just part of a generalized degenerative disc disease which is present at other levels also and it is a progressive disease with varying consequences.” Dr. Sidhu opined that appellant was able to perform the duties of a forestry technician from the point of view of the accepted conditions as listed in the SOAF. He noted, however, that appellant had nonwork-related conditions of generalized degenerative disc disease, spondylolisthesis at L5-S1, and pars defect at L5. Dr. Sidhu indicated that some people could function well with these conditions, but others could have a lot of symptoms. He related that, according to the surveillance video, appellant was capable of handling fairly tough situations so he should be able to work. Dr. Sidhu noted, however, that appellant’s nonwork-related condition of spondylolisthesis could produce symptoms of sciatica, which at times could make it difficult to work in hazardous conditions. He provided a work capacity evaluation form which indicated that appellant was capable of working with limitations. Dr. Sidhu indicated that appellant’s limitations were for his nonaccepted conditions.

On June 2, 2016 OWCP proposed to terminate appellant’s wage-loss compensation because he no longer had continuing disability from work. It found that the weight of medical evidence rested with the May 6, 2016 report of Dr. Sidhu who found that his work-related lumbar and hip condition had ceased and that he was no longer disabled from all work as a result of his accepted injury. Appellant was afforded 30 days to submit additional evidence or argument, in writing, if he disagreed with the proposed termination.

In a June 29, 2016 report, Dr. Robert W. Macht, a general surgeon, indicated that appellant worked for the employing establishment from 1998 to 2004. He related appellant’s complaints of continued moderate back pain, numbness about the right great toe and occasionally the entire foot, and mild left hip pain. Dr. Macht indicated that appellant could not lift more than 10 pounds, had problems with prolonged sitting and walking, could only drive for 1 hour, and could only walk for 30 minutes. Upon physical examination, he reported that appellant walked with a mild-to-moderate limp, favoring the right leg. Examination of appellant’s lumbar spine showed tightness and slight pain with motion of his back. Dr. Macht noted that range of motion of appellant’s back showed limited flexion to 30 degrees, extension to 6 degrees, and lateral bending to 1.5 degrees bilaterally. Straight leg raise testing was negative. Dr. Macht reported decreased sensation to light touch about the right great toe. He indicated that examination of appellant’s left hip showed pain with resistance against active motion and minimal weakness. Dr. Macht diagnosed musculoligamentous sprain of back with spondylolisthesis and degenerative disc disease.

Dr. Macht opined that there was a causal connection between appellant’s degenerative disc disease, spondylosis, and spondylolisthesis with his work-related activities. He explained that it was frequently noted in literature that frequent back stress could lead to degenerative disc disease, spondylosis, and spondylolisthesis. Dr. Macht indicated that appellant had repetitive stress on his back due to his work activities, including prolonged walking and standing, and worked with a 45-pound fire pack. He found that appellant was permanently and totally disabled from his federal employment as a fire forestry technician. Dr. Macht noted that there were no restrictions which would enable him to perform his work activities. He related that a reported video showed him doing certain work activities, which would not change the concept of the cause or etiology of appellant’s medical condition.

On July 1, 2016 OWCP received a brief from appellant's then-counsel who noted that it was unlawful for special investigators employed by an agency's Office of the Inspector General (OIG) to ask physicians about a claimant's work tolerance limitations. He indicated that special investigators could not discuss investigations and share evidence with doctors. Counsel argued that when a surveillance video is offered for the purpose of gaining a medical opinion, the employee must be notified, provided a copy if requested, and offered an opportunity to explain the events depicted. He alleged that OWCP did not provide notice of the surveillance video to appellant before providing it to Dr. Sidhu, nor provide an opportunity for appellant to obtain a copy of the unedited video and make a response. Counsel contended that the fact that OWCP did not inform appellant of the existence of this video, but sent it immediately to the SECOP was an indication that OWCP intentionally sought to evade honoring appellant's legal rights. He reported that the Board had repeatedly reversed proposed terminations based on video surveillance as part of an OIG investigation and cited to previous Board decisions.

Counsel also asserted that Dr. Sidhu's April 6, 2016 second opinion examination and report was insufficient to establish that appellant's accepted lumbar and left hip conditions had resolved. He noted that there was no discussion in Dr. Sidhu's report of the medical evidence to support his opinion. Counsel alleged that Dr. Sidhu's comments strongly indicate that his opinion was due solely to reviewing the undisclosed video, and not a result of any objective medical tests or examination. He further reported that he was providing a new report from Dr. Macht that was in direct contrast to Dr. Sidhu's medical opinion. Counsel asserted that Dr. Macht provided a detailed explanation for his conclusion that appellant was permanently disabled as a result of his work-related conditions.

In a July 3, 2016 letter, counsel noted that appellant's employing establishment was falsely claiming or implying that he was not a firefighter. He indicated that he was attaching copies of appellant's official government records, which showed that appellant performed firefighting duties at all times prior to developing his current disabilities. Counsel explained that there was no job title in the forest service called a "firefighter," but that all firefighters were considered forestry technicians and were trained to perform such functions. He provided training requirements, competency descriptors, and position descriptions for a fire engine supervisor, engine module supervisor, and supervisory fire engine operator.

Appellant received medical treatment from Dr. Clement K. Jones, an orthopedic surgeon. In an August 5, 2016 progress note, Dr. Jones reviewed the medical treatment appellant had received for his accepted lumbar and left hip conditions and noted that appellant's chief complaint was of low back pain and right leg sciatic pain. Upon examination of appellant's lumbar spine, he reported slight tenderness to palpation in the midline and paraspinaly on the right thoracolumbar spine and painful percussive tenderness. Dr. Jones provided range of motion findings and noted that appellant's gait was functionally normal, but with a slight limp on the right. Bilateral lower extremity muscle strength revealed no obvious deficit except for subjectively reported increased back pain. Dr. Jones indicated that seated active straight leg raise and slump test were positive bilaterally and supine passive straight leg raise test was positive on the right. He diagnosed spondylolisthesis at L5-S1 level, spondylolysis of the lumbosacral region, spondylosis of the lumbar region, lumbar disc degeneration, retrolisthesis, and chronic pain disorder. Dr. Jones recommended updated diagnostic tests.

In a December 9, 2016 electromyography and nerve conduction velocity (EMG/NCV) study report of appellant's bilateral lower extremities, Dr. Kevin M. Satow, Board-certified in physical medicine and rehabilitation, noted normal latency and amplitude responses, normal distal latencies, amplitudes, and conduction velocity responses, normal insertional activity, and no sustained fibrillations or positive sharp waves noted. He explained that there were electromyography findings consistent with early axonopathy in the mid and lower paralumbar region, but no active denervation noted in the lower extremity.

OWCP finalized the termination of appellant's wage-loss compensation benefits, effective December 28, 2016, in a decision dated December 27, 2016. It found that the weight of the medical evidence rested with Dr. Sidhu, the second opinion physician, who had determined in a May 6, 2016 report, that appellant no longer had any residuals of or disability due to the work-related lumbar and left hip conditions.

### **LEGAL PRECEDENT**

According to FECA, once OWCP accepts a claim and pays compensation, it has the burden of justifying termination or modification of an employee's benefits.<sup>2</sup> OWCP may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.<sup>3</sup> Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>4</sup>

### **ANALYSIS**

OWCP accepted that appellant sustained lumbar degenerative disc disease and left hip sprain as a result of his repetitive duties as a forestry technician. It terminated his wage-loss compensation, effective December 28, 2016, based on the May 6, 2016 second opinion report of Dr. Sidhu. The Board finds, however, that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation because Dr. Sidhu's opinion was not sufficiently rationalized.<sup>5</sup>

In a May 6, 2016 report, Dr. Sidhu indicated that he had reviewed the SOAF and appellant's history. He provided physical examination findings and diagnosed degenerative disc disease of the lumbar spine, spondylolisthesis at L5-S1 with status post left hip surgery, right shoulder post rotator cuff repair, and left shoulder impingement decompression, well functioning. Dr. Sidhu reported that appellant's left hip condition had resolved, but indicated that his degenerative disc condition at L4-5 was still present. He explained that appellant's degenerative disc disease was "just part of a generalized degenerative disc disease which is present at other levels also and it is a progressive disease with varying consequences." The

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<sup>2</sup> *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

<sup>3</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

<sup>4</sup> *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>5</sup> *See L.P.*, Docket No. 08-1648 (issued August 28, 2009).

Board finds that Dr. Sidhu did not unequivocally conclude that appellant no longer had residuals of his accepted lumbar degenerative disc condition. On the contrary, Dr. Sidhu reported that appellant's accepted lumbar condition was still present. Although he attributed appellant's degenerative disc disease to a generalized and progressive disease, the Board finds that he did not provide a definitive, well-rationalized conclusion to establish that appellant's accepted lumbar condition had ceased and that he no longer had residuals of or disability related to his work-related lumbar condition. Medical evidence that states a conclusion, but does not offer any rationalized medical explanation regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.<sup>6</sup> Dr. Sidhu did not provide any reasoning to support his brief statement that appellant's work-related disability had ceased.<sup>7</sup>

The Board finds, therefore, that OWCP erred by terminating appellant's wage-loss compensation benefits, effective December 28, 2016, based on the second opinion report of Dr. Sidhu. The Board shall reverse OWCP's decision terminating appellant's wage-loss compensation benefits.

### **CONCLUSION**

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation benefits.

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<sup>6</sup> *J.F.*, Docket No. 09-1061 (issued November 17, 2009); *A.D.*, 58 ECAB 149 (2006).

<sup>7</sup> *See A.R.*, Docket No. 12-0443 (issued October 9, 2012).

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 27, 2016 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 14, 2017  
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