

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

C.E., Appellant)	
)	
and)	Docket No. 19-0661
)	Issued: October 1, 2019
DEPARTMENT OF THE AIR FORCE,)	
CIVIL ENGINEER SQUADRON, RAMSTEIN)	
AIR FORCE BASE, Germany, Employer)	
)	

Appearances: *Case Submitted on the Record*
*Paul H. Felser, Esq., for the appellant*¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 1, 2019 appellant, through counsel, filed a timely appeal from an August 7, 2018 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 over the merits of this case.³

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.*

³ The Board notes that, following the August 7, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective January 7, 2018, because he ceased to have residuals or disability causally related to his accepted October 16, 1989 employment injury.

FACTUAL HISTORY

On November 6, 1989 appellant, then a 32-year-old masonry worker, filed a traumatic injury claim (Form CA-1) alleging that on October 16, 1989 he sustained injuries to his back and upper left thigh due to lifting and moving paint cans and boxes of paint rollers while in the performance of duty. He continued to perform his regular-duty work until October 26, 1989 when he began working in a limited-duty position. OWCP accepted appellant's claim for lumbar strain. It subsequently expanded the accepted conditions to include herniated disc at L5. On January 25, 1991 appellant underwent OWCP-authorized lumbar surgery, including partial hemilaminectomy at L5, foraminotomy at L5-S1, and discectomy at L5-S1.

Appellant received regular medical treatment for his back condition from attending physicians who diagnosed herniated or ruptured disc at L5-S1. In the mid-2010s, appellant began to be treated by Dr. Candace Worsham, an osteopath Board-certified in family medicine. In an April 30, 2015 report, Dr. Worsham noted appellant's complaints of back pain/spasms and diagnosed herniated lumbar disc.

In August 2016, OWCP referred appellant to Dr. Simon Finger, a Board-certified orthopedic surgeon, for a second opinion examination and requested that he provide an opinion regarding whether appellant continued to have residuals or disability causally related to his accepted October 16, 1989 employment injury.⁴

In an August 11, 2016 report, Dr. Finger reported his examination findings and indicated that appellant continued to have residual symptoms of his October 16, 1989 employment injury even after undergoing corrective surgery on January 25, 1991. He opined that appellant was unable to return to his date-of-injury job as a masonry worker and noted that his opinion was primarily based on appellant's subjective pain complaints.

On February 15, 2017 the employing establishment provided OWCP with copies of surveillance videos of appellant, which were obtained by its investigative division between January 11 and February 1, 2017. It also provided still images of frames from the surveillance videos with written summaries of his activities depicted in the videos. The summaries indicated that appellant engaged in such activities as bending, squatting, and kneeling while building a workbench out of pallets, squatting and kneeling on the ground and leaning into the driver's compartment of a truck, and bending down to pick up a chainsaw and gas can and placing them in the bed of a truck.

⁴ OWCP provided Dr. Finger with a statement of accepted facts (SOAF) which described the duties and physical requirements of the masonry worker job, including heavy lifting up to 90 pounds.

In a March 23, 2017 letter, OWCP advised Dr. Worsham that it was providing her with copies of the surveillance videos, along with the associated still frame shots and written summaries, and requested that she review these materials and produce an updated narrative report regarding appellant's medical condition and ability to work. The March 23, 2017 letter and enclosures were also sent to appellant.

In response, Dr. Worsham produced a March 24, 2017 report in which she noted that appellant presented for examination on that date and reported that he was doing fairly well. She diagnosed displacement of lumbar intervertebral disc without myelopathy, noted that appellant had reached maximum medical improvement, and opined that he was "not a candidate for gainful employment due to preexisting work-related injury."

In May 2017, OWCP again referred appellant to Dr. Finger for a second opinion examination and requested that he provide an opinion regarding whether appellant continued to have residuals or disability causally related to his accepted October 16, 1989 employment injury. It provided Dr. Finger with copies of the surveillance videos and the associated materials.

In a June 8, 2017 report, Dr. Finger discussed appellant's factual and medical history, including the mechanism of his October 16, 1989 employment injury.⁵ He noted that appellant reported that his back condition had improved after his January 25, 1991 surgery, but that he still had low back pain. Dr. Finger detailed his physical examination findings and noted that appellant was able to toe walk, heel walk, and squat. He advised that, upon range of motion testing of the back, appellant could forward flex to approximately 70 degrees and had full extension. Bilateral straight leg testing was negative, deep tendon reflexes were 2/2 and equal bilaterally, and there was no lower extremity atrophy. Dr. Finger opined that appellant's accepted employment conditions sustained on October 16, 1989 had resolved and noted that the disc herniation at L5-S1 had resolved as a result of surgical intervention in January 1991. He explained that appellant had no objective findings consistent with an L5-S1 disc herniation or radiculopathy and noted that his subjective symptoms of low back pain were not supported by objective findings on physical examination or by medical reports in the case record. Dr. Finger maintained that appellant was able to return to his date-of-injury position as a masonry worker on a full-time basis. In a June 8, 2017 work capacity evaluation form (Form OWCP-5c), he indicated that appellant could return to his usual employment without restrictions.

In an August 10, 2017 letter, OWCP advised appellant that it proposed to terminate his wage-loss compensation and medical benefits because he ceased to have residuals or disability causally related to his accepted October 16, 1989 employment injury. It informed him that the proposed action was justified by Dr. Finger's June 8, 2017 report.

On August 30, 2017 appellant authorized counsel to represent him in the present case. In a September 7, 2017 statement, counsel argued that Dr. Finger did not discuss all the relevant medical evidence and asserted that his opinion did not contain adequate rationale with respect to the question of whether appellant continued to have residuals or disability due to his accepted

⁵ Dr. Finger indicated that he had reviewed the provided SOAF and the video surveillance materials from early-2017.

October 16, 1989 employment injury.⁶ In response to counsel's concerns, OWCP requested that Dr. Finger provide a supplemental report regarding employment-related residuals/disability and appellant's ability to work.⁷

In a November 13, 2017 supplemental report, Dr. Finger indicated that he had reviewed the medical evidence provided by OWCP. He noted that Dr. Worsham had found appellant totally disabled from work and opined that there was no objective evidence in the case record to support such an opinion. Dr. Finger advised that there was no documentation of lower extremity atrophy, weakness, or loss of range of motion, and that the physical examinations revealed normal strength of the back muscles without swelling or deformity. He indicated that his range of motion testing of appellant's back did not reveal any motion loss.⁸ Dr. Finger noted that the type of narcotic pain medication used by appellant was not out of the ordinary for patients with chronic pain, but he recommended that appellant be weaned off of these narcotic pain medications by a pain specialist because chronic use of such medications can lead to hyperanalgesia or increased pain.

Dr. Finger repeated the opinion contained in his June 8, 2017 report that appellant could return to his date-of-injury position as a masonry worker on a full-time basis. He noted that there was no objective evidence in the medical record or on physical examination indicating that appellant would be unable to perform his date-of-injury work. Dr. Finger indicated that the surveillance video materials provided additional evidence that appellant was capable of performing his date-of-injury work. In a November 13, 2017 work capacity evaluation form, he advised that appellant could return to his usual employment without restrictions.

By decision dated December 21, 2017, OWCP terminated appellant's wage-loss compensation and medical benefits, effective January 7, 2017, because he ceased to have residuals or disability causally related to his accepted October 16, 1989 employment injury. It found that the weight of the medical evidence regarding employment-related residuals and disability rested with Dr. Finger's well-rationalized opinion.

Appellant, through counsel, requested a telephonic hearing with a representative of OWCP's Branch of Hearings and Review.⁹ During the June 6, 2018 hearing, counsel argued that he had not been given an adequate opportunity to review the surveillance video taken of

⁶ Appellant submitted a September 20, 2017 report from Dr. Barry Willbrandt, a Board-certified emergency medicine physician, who diagnosed back pain/chronic pain and prescribed medications.

⁷ OWCP provided Dr. Finger with additional medical records, including several reports of Dr. Worsham.

⁸ Dr. Finger indicated that medical records he reviewed referenced loss of motion of the back, but that these records did not contain any findings to support such motion loss.

⁹ Prior to the hearing being held, appellant submitted a December 14, 2017 report from Dr. Fani Manney, a Board-certified pain medicine physician, who diagnosed lumbar disc degeneration, lumbar disc disease, and post-laminectomy lumbar syndrome. He reported to Dr. Manney that his attending physician was no longer taking patients with workers' compensation cases and that he had run out of medication. Dr. Manney prescribed appellant medication for his pain.

appellant.¹⁰ He also claimed that appellant had an addiction to narcotics prescribed for his employment-related injuries, which prevented him from working.

Counsel requested the opportunity to review copies of the surveillance videos from early-2017 and he received copies of the videos, with associated materials, in early-July 2017.¹¹ On July 16, 2017 he requested that OWCP grant him an extension until August 3, 2017 in order to review the surveillance materials. OWCP granted counsel's request for an extension. Counsel did not submit any further statements to OWCP regarding the surveillance materials.

By decision dated August 7, 2018, OWCP's hearing representative affirmed OWCP's December 21, 2017 decision.

LEGAL PRECEDENT

Under FECA, once OWCP has accepted a claim it has the burden of justifying termination or modification of compensation benefits.¹² OWCP may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.¹³ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.¹⁴

ANALYSIS

The Board finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective January 7, 2018, because he ceased to have residuals or disability after that date causally related to his accepted October 16, 1989 employment injury.

In his June 8, 2017 report, Dr. Finger opined that appellant's accepted employment conditions sustained on October 16, 1989 had resolved and noted that the disc herniation at L5-S1 had resolved as a result of surgical intervention in January 1991. He found that appellant had no objective findings consistent with an L5-S1 disc herniation or radiculopathy and noted that his subjective symptoms of low back pain were not supported by objective findings on physical examination or by medical reports in the case record. Dr. Finger maintained that appellant was able to return to his date-of-injury position as a masonry worker on a full-time basis. In his November 13, 2017 supplemental report, he advised that there was no documentation of lower extremity atrophy, weakness, or loss of range of motion, and that the physical examinations of record revealed normal strength of the back muscles without swelling or deformity. Dr. Finger

¹⁰ Counsel claimed that he had not received a complete copy of all the surveillance videos.

¹¹ Counsel also submitted reports of Dr. Worsham that were previously of record.

¹² *L.L.*, Docket No. 18-1426 (issued April 5, 2019); *C.C.*, Docket No. 17-1158 (issued November 20, 2018); *I.J.*, 59 ECAB 408 (2008); *Vivien L. Minor*, 37 ECAB 541 (1986).

¹³ *A.D.*, Docket No. 18-0497 (issued July 25, 2018). In general, the term disability under FECA means incapacity because of injury in employment to earn the wages, which the employee was receiving at the time of such injury. See 20 C.F.R. § 10.5(f).

¹⁴ See *R.P.*, Docket No. 17-1133 (issued January 18, 2018).

repeated his earlier opinion that appellant could return to his date-of-injury position as a masonry worker on a full-time basis. He noted that there was no objective evidence in the medical record or on physical examination indicating that appellant would be unable to perform his date-of-injury work. Dr. Finger further maintained that the surveillance video materials provided additional evidence that appellant was capable of performing his date-of-injury work.

The Board has carefully reviewed the opinion of Dr. Finger and notes that it has reliability, probative value, and convincing quality with respect to its conclusions regarding the underlying issue of the present case. Dr. Finger provided a thorough factual and medical history and accurately summarized the relevant medical evidence. He provided medical rationale for his opinion by explaining that appellant's examination results showed that he ceased to have objective findings related to the accepted October 16, 1989 employment injury.¹⁵

Before the OWCP hearing representative, counsel argued that appellant had an addiction to narcotics prescribed for his employment-related injury, which prevented him from working. However, he did not provide evidence in support of this assertion and Dr. Finger did not provide any indication in his reports that appellant's medication usage prevented him from working as a masonry worker on a full-time basis. The Board notes that Dr. Finger was fully aware of appellant's medication regimen and recommended that appellant be weaned off his medication for the primary purpose of avoiding possible increased sensitivity to pain in the future.

The Board therefore finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinions of Dr. Finger, OWCP's referral physician. The June 8 and November 13, 2017 reports of Dr. Finger establish that appellant had no residuals or disability after January 7, 2018 due to his accepted October 16, 1989 employment injury.

On appeal counsel argues that appellant was not given an adequate opportunity to comment on the surveillance videos provided to Dr. Finger and Dr. Worsham. OWCP procedures 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.*,¹⁶ 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.¹⁷

¹⁵ See *W.C.*, Docket No. 18-1386 (issued January 22, 2019); *Melvina Jackson*, 38 ECAB 443 (1987) (regarding the importance, when assessing medical evidence, of such factors as a physician's knowledge of the facts and medical history, and the care of analysis manifested and the medical rationale expressed in support of the physician's opinion). The Board notes that appellant submitted several reports from around the time of Dr. Finger's evaluation, including a September 20, 2017 report from Dr. Barry Willbrandt and a December 14, 2017 report from Dr. Manney. However, these reports have no probative value on the underlying issue of this case because they do not contain an opinion on appellant's residuals or disability in relation to his accepted October 16, 1989 employment injury. See *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

¹⁶ 58 ECAB 478 (2007).

¹⁷ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.9g (September 2010).

The Board notes that OWCP provided Dr. Worsham, an attending physician, copies of surveillance videos on March 23, 2017, a time approximately two months before it provided them to Dr. Finger in May 2017. Appellant was copied on a March 23, 2017 letter discussing the surveillance videos and, therefore, was aware of their existence. However, he made no effort to inquire as to the contents of the surveillance videos at that time.¹⁸ The Board finds that, in the present case, OWCP complied with its procedures by providing appellant an opportunity to view the surveillance videos and comment on them prior to the time it provided them to Dr. Finger.¹⁹

For these reasons, OWCP properly found that Dr. Finger's well-rationalized opinion represented the weight of the medical opinion evidence and justified its termination of appellant's wage-loss compensation and medical benefits, effective January 7, 2018.

CONCLUSION

The Board finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective January 7, 2018, because he ceased to have residuals or disability causally related to his accepted October 16, 1989 employment injury.

¹⁸ In addition, counsel, who first began representing appellant in August 2017, made a request to view the surveillance videos in July 2018 and was provided a copy of them at that time. After viewing the surveillance videos, he did not add any comments to the case record regarding them. During the June 6, 2018 hearing with OWCP's hearing representative, counsel asserted that he did not receive a complete copy of all the surveillance videos. OWCP represented that it had, in fact, provided copies of all the surveillance videos and counsel did not provide any support for his assertion.

¹⁹ See *R.B.*, Docket No. 15-0420 (issued August 10, 2015) (citing the 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).

ORDER

IT IS HEREBY ORDERED THAT the August 7, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 1, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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