United States Department of Labor
Employees' Compensation Appeals Board

E.M., Appellant	)	
and	)	**Docket No. 22-0241**
	)	**Issued: February 8, 2023**
U.S. POSTAL SERVICE, DELAWARE PROCESSING AND DISTRIBUTION CENTER, Wilmington, DE, Employer	)	

Appearances:
Michael D. Overman, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On December 6, 2021 appellant, through counsel, filed a timely appeal from a June 14, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP).[2] Pursuant to the

[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] The record also contains an October 18, 2021 OWCP decision finding that appellant forfeited her entitlement to wage-loss compensation from March 17, 2017 through January 8, 2019. Counsel indicated that he was appealing this decision to the Board; however, by correspondence to the Board dated January 12, 2022, he specified that he was appealing only the June 14, 2021 termination decision. Consequently, the October 18, 2021 decision is not before the Board at this time. *See* 20 C.F.R. § 501.3.

Federal Employees' Compensation Act[3] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[4]

ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss compensation effective December 16, 2020 as she had no further disability or residuals causally related to her accepted January 30, 2017 employment injury.

FACTUAL HISTORY

On January 30, 2017 appellant, then a 45-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on that date she strained her right knee while in the performance of duty. OWCP accepted the claim for a right knee sprain of the collateral ligament of the right knee and a complex tear of the medial meniscus of the right knee. It paid appellant wage-loss compensation for total disability on the supplemental rolls effective March 17, 2017 and on the periodic rolls effective April 29, 2018.

Following her injury, appellant received treatment from Dr. Matthew Handling, a Board-certified orthopedic surgeon. In a report dated February 20, 2020, Dr. Handling discussed her complaints of bilateral knee pain and right hip pain. He diagnosed primary osteoarthritis of both knees, a right knee medial meniscus tear, a January 30, 2017 work injury causing a knee sprain and medial meniscus tearing with cartilage fissuring at the patellofemoral joint, right hip trochanteric bursitis, lymphoma, and a history of sepsis. In a work note of even date, Dr. Handling found that appellant could work 3.5 hours per day standing and walking up to 15 minutes. Dr. Handling advised that she could perform only desk duty with no climbing, squatting, bending, kneeling, crawling, or twisting.

On August 17, 2020 a special agent with the employing establishment's Office of Inspector General (OIG) advised appellant's health care provider that it was conducting an investigation of appellant and requested assistance to obtain material relevant to the investigation.

In a September 3, 2020 memorandum of interview, D.D., a special agent with the OIG, indicated that he had interviewed Dr. Handling on that date. Dr. Handling informed him that, at the time of his February 20, 2020 examination, appellant had walked at a slow pace with a slight limp. D.D. advised Dr. Handling that during surveillance she had "been observed performing activities inconsistent with her total disability status," including volunteering or working at YMCA, shopping, carrying items, and bending. He provided Dr. Handling with video surveillance footage taken of appellant from May 22 to June 6, 2019 and October 30, 2019 to August 7, 2020. D.D. related that Dr. Handling had watched the video for several minutes and then related that he had "seen enough video" and was "ready to move forward." Dr. Handling told D.D. that based on

[3] 5 U.S.C. § 8101 *et seq.*

[4] The Board notes that, following the June 14, 2021 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.*

what he had seen on the surveillance video, appellant could have performed her job duties as set forth in the duty status report (Form CA-17).

In a Form CA-17 report dated September 3, 2020, Dr. Handling checked a box marked "Yes" that appellant could perform her usual work with restrictions.

In an investigative report dated September 10, 2020, an OIG special agent-in-charge advised that the OIG's office had conducted surveillance of appellant from May 22, 2019 to August 7, 2020. He asserted that she had been seen working or volunteering at the YMCA, carrying items, shopping, and performing extended twisting, pushing, pulling, standing, and walking.

In a September 11, 2020 report, K.C., a special agent-in-charge with the OIG, advised that appellant owned a day care business.

On September 17, 2020 Dr. Handling's office notified appellant that it had discharged her from his care.

In correspondence dated September 22, 2020, the employing establishment instructed appellant to attend a predisciplinary interview on September 28, 2020.

On September 29, 2020 Dr. Bradley Bley, an osteopath, discussed appellant's complaints of bilateral knee pain after a January 30, 2017 injury at work. He noted that she was not a surgical candidate due to her history of sepsis. Dr. Bley diagnosed bilateral osteoarthritis of the knee and unilateral primary osteoarthritis of the right hip.

On October 14, 2020 OWCP notified appellant of its proposed termination of her wage-loss compensation as the weight of the evidence established that she no longer had any employment-related disability. It afforded her 30 days to submit additional evidence or argument if she disagreed with the proposed termination.

In a report dated October 16, 2020, Dr. Bley discussed appellant's history of bilateral knee pain. He obtained a history of her injuring her right knee when she almost run over by another employee driving a mail transport vehicle. Dr. Bley performed a bilateral steroid injection.

In an October 26, 2020 memorandum of activity, N.P., a special agent, advised that D.D. had spoken to appellant, her union representative, and a labor relations employee by telephone on October 23, 2020. D.D. offered appellant a "copy of the surveillance video before or after the interview was conducted" but she had "refused to accept a copy of the surveillance video." He asked that she complete a form indicating that she was declining a copy of the video and informed her that she could obtain a copy of the video at any time.

In a memorandum of interview dated October 26, 2020, D.D. asserted that he and another agent had interviewed Dr. Bley on that date. Dr. Bley related that appellant had walked slowly and used a cane at the time of his October 16, 2020 examination. He indicated that he was not aware that she had been discharged from her previous physician after being investigated for fraud. Dr. Bley asserted that he had not provided work restrictions or addressed the cause of appellant's knee condition, which he related was "degenerative in nature." D.D. indicated that he had shown Dr. Bley the surveillance footage taken from May 22 to June 6, 2019 and October 30, 2019 to

August 7, 2020. After watching the video for a few minutes, he responded in the affirmative that appellant "could have performed her full-duty job during the surveillance period."

In an October 26, 2020 Form CA-17, Dr. Bley indicated that appellant could resume her usual full-time employment without restrictions.

By decision dated December 16, 2020, OWCP terminated appellant's wage-loss compensation effective that date. It found that the September 3, 2020 Form CA-17 from Dr. Handling represented the weight of the evidence and established that she had no further disability due to her accepted employment injury.

On December 29, 2020 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review.

On January 25, 2021 Dr. Bley discussed appellant's complaints of bilateral knee pain, more on the right side and noted that she had a history of an October 30, 2017 right knee injury. He diagnosed bilateral knee and right hip osteoarthritis.

On February 9, 2021 Dr. Steven Dellose, a Board-certified orthopedic surgeon, diagnosed right knee pain, bilateral knee primary osteoarthritis, and unilateral primary osteoarthritis of the right knee.

In a memorandum for the hearing dated March 8, 2021, the OIG's office advised that its agents were not prohibited from contact with a physician.[5] It asserted that as long as OWCP "relies on independent evidence to make their decision, OIG contact with a physician is irrelevant. The OIG is an independent law enforcement entity that is wholly removed from the [employing establishment] management chain."

A telephonic hearing was held on April 5, 2021. Counsel maintained that OWCP could not rely on the reports of either Dr. Handling or Dr. Bley in terminating appellant's wage-loss compensation as OIG agents had in-person contact with both physicians. He additionally asserted that OWCP had failed to advise her that it had received surveillance footage or that the video would be shown to her physicians. Counsel cited Board case law and noted that 20 C.F.R. § 10.506 prohibited contact by agents of the employer and appellant's physician.

In a letter dated April 26, 2021, D.D. related that on September 8, 2020 he had received a telephone call from appellant, who informed him that she had obtained his telephone number from Dr. Handling's office. Appellant maintained that Dr. Handling's office had told her that there was an investigation and surveillance video. D.D. indicated that he had offered her a copy of the video when he spoke to appellant on September 8, 2020. He related that appellant had received a copy of the surveillance video prior to her November 17, 2020 removal from employment.

On April 28, 2021 D.D. indicated that he had spoken to appellant twice on September 8, 2020 and once on October 23, 2020 and had offered her a copy of the surveillance video each time. He further advised that she and her union representative had received a copy of the investigation and surveillance video through the grievance process. D.D. asserted that he did not work for the employing establishment, but instead for the OIG's office, which he indicated was an independent

[5] The memorandum is dated March 8, 2020; however, this appears to be a typographical error.

law enforcement agency. He submitted a November 17, 2020 notice of removal of appellant from the employing establishment for improper conduct/loss of funds/theft by misrepresentation.

By decision dated June 14, 2021, OWCP's hearing representative affirmed the December 16, 2020 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.[6] After it has determined that an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[7] Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[8]

ANALYSIS

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation effective December 16, 2020.

Initially, the Board notes that on appeal counsel contends that the opinions of Dr. Handley and Dr. Bley were tainted through contact with the OIG. Counsel cites 20 C.F.R. § 10.506, which prohibits an employing establishment from contacting a claimant's treating doctor in person or by telephone, but allows contact in writing. However, the Board has never construed this regulation to prohibit contact by an employing establishment's OIG in the course of an investigation of irregularities in a specific claim.[9] The Board has explicitly acknowledged that it lacks authority to rule on the actions of an employing establishment.[10] The authority of the Board extends only to decisions appealed from OWCP.[11]

Counsel further argues that appellant was not advised by OWCP that surveillance footage had been shown to her attending physician and cites *F.S.*[12] in support of his contention. In *F.S.*, the Board found that although video footage may be of some value to a physician asked to render a medical opinion, it may be misleading if material facts are omitted. The Board noted that OWCP

[6] *R.H.*, Docket No. 19-1064 (issued October 9, 2020); *M.M.*, Docket No. 17-1264 (issued December 3, 2018).

[7] *A.T.*, Docket No. 20-0334 (issued October 8, 2020); *E.B.*, Docket No. 18-1060 (issued November 1, 2018).

[8] *C.R.*, Docket No. 19-1132 (issued October 1, 2020); *G.H.*, Docket No. 18-0414 (issued November 14, 2018).

[9] *See J.H.*, Docket No. 13-1032 (issued September 26, 2014); *D.B.*, Docket No. 14-0451 (issued August 12, 2014).

[10] The investigative practices of the OIG are not within the jurisdiction of ECAB. *F.S.*, Docket No. 11-863 (issued September 26, 2012), *petition for recon. denied*, Docket No. 11-863 (issued May 8, 2014). *See also D.B.*, Docket No. 14-451 (issued August 12, 2014).

[11] *J.H.*, *supra* note 9; *Margaret A. Hoskin*, 9 ECAB 186 (1956).

[12] *Supra* note 10.

had the obligation 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.

The Director, in a January 25, 2022 memorandum in justification, contends that appellant had multiple opportunities to receive a copy of the video surveillance prior to OWCP's termination of her wage-loss compensation, and that OWCP could thus rely on the medical evidence obtained after viewing the footage.

In *J.M.*,[13] 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 comment regarding the accuracy of the recording. In this case, the record supports that D.D., an agent with the OIG's office, offered appellant a copy of the surveillance video on September 8 and October 23, 2020. The Board finds that appellant had a reasonable opportunity to review and respond to the surveillance video prior to OWCP's December 16, 2020 termination of her wage-loss compensation.[14] The Board further notes that she has not challenged the fact that she was the person in the video, or that she performed the activities shown.[15]

The Board finds, however, that the medical evidence is insufficient to support a termination of appellant's wage-loss compensation. OWCP terminated her compensation based on Dr. Handling's September 3, 2020 Form CA-17 releasing her to resume work with limitations. Dr. Handling, however, provided no explanation for his opinion or any rationale supporting his release of appellant to return to work with no limitations.[16] Such rationale is particularly necessary given that in his prior report dated February 20, 2020 he had found that she could work for only 3.5 hours per day, standing and walking up to 15 minutes and performing no climbing, squatting, bending, kneeling, crawling, or twisting. While Dr. Handling rendered his opinion after review of the surveillance video, he did not describe what he had reviewed on the video, or address why it had caused him to reconsider his prior opinion.[17] As he did not explain why appellant had no further disability or residuals due to his accepted employment injury, Dr. Handling's opinion is insufficient to meet OWCP's burden of proof.[18]

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation effective December 16, 2020.

[13] 58 ECAB 478 (2007).

[14] *See K.C.*, Docket No. 17-0379 (issued November 9, 2017); *P.M.*, Docket No. 16-1321 (issued January 10, 2017); *J.J.*, Docket No. 15-0475 (issued September 28, 2016).

[15] *P.S.*, Docket No. 13-1018 (issued June 19, 2014).

[16] *See T.D.*, Docket No. 15-1938 (issued July 11, 2016); *K.F.*, Docket No. 14-0681 (issued July 11, 2014).

[17] *See J.H.*, *supra* note 9.

[18] *See supra* note 16.

ORDER

IT IS HEREBY ORDERED THAT the June 14, 2021 decision of the Office of Workers' Compensation Programs is reversed.

Issued: February 8, 2023
Washington, DC

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board