

U.S. DEPARTMENT OF LABOR

RECEIVED MAY 16 2016

OFFICE OF WORKERS' COMP PROGRAMS  
PO BOX 8300 DISTRICT 6 JAC  
LONDON, KY 40742-8300  
Phone: (904) 366-0100

May 12, 2016

Date of Injury:  
Employee:

Dear Mr.

This concerns your compensation case and your request for reconsideration received on 02/18/2016.

We have evaluated the evidence submitted and have reviewed the merits of your case under 5 U.S.C. 8128. You have provided sufficient evidence to warrant modification of the decision dated 02/23/2015. Based on the information received, the decision is now vacated.

The reasons for this decision are outlined in the enclosed Notice of Decision.

Sincerely,



Didi Anderson  
Senior Claims Examiner

PAUL H. FELSER  
FELSER LAW FIRM, P.C.  
QUEENSBOROUGH BANK BUILDING  
7393 HODGSON MEMORIAL DRIVE, SUITE 102  
SAVANNAH, GA 31406

*If you have a disability (a substantially limiting physical or mental impairment), please contact our office/claims examiner for information about the kinds of help available, such as communication assistance (alternate formats or sign language interpretation), accommodations and modifications.*

**NOTICE OF DECISION**

**Claimant Name:** \_\_\_\_\_

**Case Number:** \_\_\_\_\_

ISSUE: The issue for determination is whether the evidence presented is of sufficient probative value to vacate the decision dated 02/23/2015.

REQUIREMENTS FOR ENTITLEMENT: In accordance with the regulations set forth in 20 CFR § 10.609, if an application for reconsideration is accompanied by new and relevant evidence or by an arguable case for error, OWCP will conduct a merit review of the case to determine whether the prior decision should be modified. If sufficient evidence exists to overturn the prior decision, it should be vacated.

For you to be entitled to continuing compensation payments, the medical evidence in your case must establish that you continue to suffer residuals of your accepted work-related condition. If so, the medical evidence must further show that your disability is still related to your work injury, and not some other medical condition. The benefits of the Federal Employees' Compensation Act are not payable after work-related conditions have resolved and/or work-related disability has ended.

The Employees' Compensation Appeals Board has stated: "The Office has met its burden of proof where the weight of medical evidence establishes that the claimant does not have residual impairment traceable to factors of employment and that any work limitations in effect are not due to a job-related condition." <sup>1</sup>

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 had an employment-related disability which continued after termination of compensation benefits. <sup>2</sup>

BACKGROUND: On \_\_\_\_\_ you filed a claim for Traumatic Injury indicating you sustained an injury or medical condition on \_\_\_\_\_ as a result of your employment as a City Carrier Assistant with the United States Postal Service in Timmonsville, SC. The injury occurred as a result of bending over to lift a tray of mail. When your claim was received, it appeared to be a minor injury that resulted in minimal or no lost time from work. Your claim was reopened for consideration because a claim for wage loss was received; therefore, your claim was formally adjudicated and accepted for SPRAIN OF BACK, THORACIC REGION.

You were under the care of Dr. \_\_\_\_\_ of \_\_\_\_\_ Dr. \_\_\_\_\_ provided work restrictions and you returned to modified work and received compensation for intermittent wage loss.

<sup>1</sup> *Rosemary N. Mahan, 16 ECAB 280*

<sup>2</sup> *Talmdge Miller, 47 ECAB \_\_\_\_ (Docket No. 95-1989, issued July 23, 1996)*

On \_\_\_\_\_ the \_\_\_\_\_ notified you that a temporary light duty assignment was available indefinitely; however, you declined to accept or report to the assignment provided. The evidence on file indicates you stopped work on \_\_\_\_\_  
On \_\_\_\_\_ you were notified of the proposed reduction of your compensation for wage loss in accordance with 20 CFR §10.500(a) based upon your declination of a temporary light duty assignment deemed by OWCP to appropriately accommodate your current work restrictions as provided in the \_\_\_\_\_ medical report from Dr. \_\_\_\_\_

You were given 30 days to submit additional relevant evidence or argument if you disagreed with the proposed action. Following due process, on 10/06/2014, the Office finalized the decision to reduce your compensation for wage loss in accordance with 20 CFR §10.500(a). You were placed on the periodic roll for compensation for partial disability.

By notice dated 01/20/2015, the Office proposed to terminate your wage loss compensation based on the \_\_\_\_\_ medical report provided by your attending physician, Dr. \_\_\_\_\_ Dr. \_\_\_\_\_ found that you were capable of returning to work without restrictions. The Office made its proposal final by decision dated 02/23/2015 and terminated your entitlement to wage loss compensation effective 02/23/2015. The decision advised you that the weight of the medical evidence of file established that you were no longer disabled from work as a result of the work injury.

On \_\_\_\_\_ the Office received verification that you returned to full duty work on \_\_\_\_\_

You disagreed with the 02/23/2015 decision and requested reconsideration by letter/appeal request form received on 02/18/2016. You submitted new evidence which entitled you to a merit review of your claim. As per the requirement of 20 C.F.R. § 10.609(a), your application for reconsideration and supportive new non-medical evidence was provided to your employer on \_\_\_\_\_ for review and comments. No response was received.

**DISCUSSION OF EVIDENCE:** The evidence reviewed and received in support of your reconsideration request since the date of the contested decision (02/23/2015), includes:

- Medical report from Dr. \_\_\_\_\_ dated \_\_\_\_\_
- Medical report from \_\_\_\_\_ dated \_\_\_\_\_
- Medical report from Dr. \_\_\_\_\_ dated \_\_\_\_\_
- Functional Capacity Evaluation (FCE) report dated \_\_\_\_\_
- Medical report from Dr. \_\_\_\_\_ dated \_\_\_\_\_ releasing you to return to work with no restrictions
- Field Nurse Report dated \_\_\_\_\_
- Physical therapy notes dated \_\_\_\_\_
- Request for medical authorization dated \_\_\_\_\_

**Factual Evidence:**

- Form CA-7 dated \_\_\_\_\_ claiming compensation for intermittent wage loss for period \_\_\_\_\_
- Your letter dated \_\_\_\_\_ requesting copy of your case file
- \_\_\_\_\_ Letter dated \_\_\_\_\_

- Your letters dated \_\_\_\_\_ and \_\_\_\_\_ regarding payment of your debt
- Your signed representation form dated \_\_\_\_\_
- Letter from Mr. Paul Felser dated \_\_\_\_\_ requesting copy of your case file
- Letter from Mr. Felser dated \_\_\_\_\_ requesting copies of the surveillance video that was provided to Dr. \_\_\_\_\_ for review.
- Mr. Felser's letter dated \_\_\_\_\_ advising this office of his new mailing address
- Position Description for a \_\_\_\_\_
- Appeal Request Form and your letter dated \_\_\_\_\_ requesting reconsideration

In your letter dated \_\_\_\_\_ you advised that in response to the notice of termination, you requested a copy of the photos and/or video(s) that were provided to Dr. \_\_\_\_\_ however, the office did not comply. You advised that you then received the requested evidence four (4) months after the 02/23/2015 decision was issued.

You contend that Dr. \_\_\_\_\_ report dated 12/31/2014 addressed the surveillance video and the job description of a \_\_\_\_\_ (CCA); however, Dr. \_\_\_\_\_ did not address any of the physical requirements of the CCA position. You discussed the FCE result dated 12/17/2014, demonstrating that you are capable of performing in a light to medium work level and that the CCA position falls under "Heavy" work level; therefore, you claim that you are not capable of performing your full duty in accordance with the FCE result. You stated that Dr. \_\_\_\_\_ report dated \_\_\_\_\_ releasing you to full duty with no restrictions is a direct contradiction of the FCE result.

You then cited prior Employees Compensation Appeals Board (ECAB) decisions where the Board disfavors investigative evidence that is presented for the purpose of obtaining an adverse medical opinion but not disclosed to the injured worker.

Upon review of your case file, it is noted that on 01/20/2015, the Office received \_\_\_\_\_ investigative reports from the \_\_\_\_\_ of \_\_\_\_\_. We were advised that the \_\_\_\_\_ conducted surveillance of your physical activities from July \_\_\_\_\_ through November \_\_\_\_\_ and that during the course of the surveillance, you were observed actively participating in physical activities contrary to your stated medical condition and restrictions. The investigative report indicated that the Reporting Agent (RA) interviewed Dr. \_\_\_\_\_ on \_\_\_\_\_ regarding your medical treatment and care. On \_\_\_\_\_ and \_\_\_\_\_ the RA again interviewed Dr. \_\_\_\_\_ and presented him with video surveillance and still photographs of you participating in physical activities inconsistent with your subjective complaints. Following review of these video surveillance and still photographs, Dr. \_\_\_\_\_ submitted a report dated \_\_\_\_\_ allowing you to return to work full duty with restrictions.

Or \_\_\_\_\_ the Office proposed to terminate your wage loss compensation on the basis that the medical report dated \_\_\_\_\_ from your attending physician Dr. \_\_\_\_\_ found that you were capable of returning to work without restrictions. You were afforded 30 days to submit evidence if you disagreed with the proposal.

In response, you submitted a letter dated \_\_\_\_\_ stating that you had no knowledge of the video until you were contacted by the \_\_\_\_\_ on or about \_\_\_\_\_. You advised this Office that you had not been provided a copy of the video tape that was provided to

Dr. \_\_\_\_\_ and requested a copy of the videotape so that you can address the contents of the video with Dr. \_\_\_\_\_. The Office did not comply with your request and proceeded to issue the final decision terminating your entitlement to wage loss compensation.

BASIS FOR DECISION: The evidence is sufficient to vacate the decision dated 02/23/2015 because OWCP should not have accepted Dr. \_\_\_\_\_ report as probative value as dispositive. The Board has held:

Where OWCP intends to offer surveillance video as evidence to a physician for the purpose of obtaining a medical opinion, it must notify the employee of its intention to do so. If the employee requests a copy of the surveillance video OWCP must provide a copy. Appellant must then be afforded an opportunity to comment and explain the events depicted in the video<sup>3</sup>.

You were never informed of its existence and were not provided a copy of the surveillance video when requested. The \_\_\_\_\_ report from Dr. \_\_\_\_\_ was submitted after visits to Dr. \_\_\_\_\_ office by agents of the employing agency. The record shows no involvement by OWCP in obtaining Dr. \_\_\_\_\_ opinion. Therefore, I find that Dr. \_\_\_\_\_ opinion was tainted and cannot support a termination of your benefit for wage loss.

CONCLUSION: Therefore, the decision dated 02/23/2015 is vacated.

  
Didi Anderson  
Senior Claims Examiner

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<sup>3</sup> J.M., 58 ECAB 478 (2007); *Frederick Nightingale*, 6 ECAB 268 (1953).