

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of SHARON Y. HARRIS and U.S. POSTAL SERVICE,  
POST OFFICE, Chicago, IL

*Docket No. 02-2393; Submitted on the Record;  
Issued February 27, 2003*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issue is whether appellant sustained a recurrence of disability beginning on May 30 and November 16, 2001 causally related to her accepted employment injury.

The case was before the Board on a prior appeal. In a decision dated January 22, 2002, the Board determined that the Office of Workers' Compensation Programs had properly reduced appellant's compensation based on her actual earnings in a part-time position as a rehabilitation clerk.<sup>1</sup> The history of the case is provided in the Board's prior decision and is incorporated herein by reference.

On June 1, 2001 appellant filed a claim alleging that she sustained a recurrence of disability on May 30, 2001 due to her work-related conditions as she was always in pain and had to do a lot of walking. On the reverse side of the claim form, appellant's supervisor indicated that appellant was on a temporary detail and had stopped work May 3, 2001. Appellant submitted numerous medical reports from Dr. Jose L. Medina, appellant's treating physician and a Board-certified neurologist,<sup>2</sup> which noted that her low back pain was worse after working and ordered a series of epidural injections. Dr. Medina referred to appellant's work status as being disabled, but failed to provide any medical rationale or opinion as to causal relationship. In a June 4, 2001 report, the Office medical adviser advised that appellant continued to have lower back pain symptoms which were not relieved with the previous surgery and physical therapy. He opined that the series of epidural injections might be helpful in controlling appellant's pain symptoms and should be authorized. On June 27, 2001 the Office authorized such epidural injections.

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<sup>1</sup> Docket No. 00-1682, issued January 22, 2002.

<sup>2</sup> By letter dated February 23, 2001, the Office authorized Dr. Medina to be appellant's attending physician.

By letter dated August 1, 2001, the Office advised appellant of the evidence required to establish a recurrence of disability claim and afforded appellant the opportunity to present such evidence.

In an August 13, 2001 statement, appellant advised that, when her temporary duty assignment changed, the place where she had to park changed and the amount of walking increased, which affected her work-related conditions.

In an August 13, 2001 report, Dr. Medina noted that, on May 30, 2001, appellant's pain worsened and became more severe. Appellant reported that, although her job had not changed, new parking regulations made her walk two and a half blocks to reach her area of work. Before this regulation, she only walked half a block. Dr. Medina opined that appellant was totally disabled as a result of her work-related injuries. In subsequent medical reports, Dr. Medina found that appellant was totally disabled.

The Office referred appellant's case file to an Office medical adviser. In a September 28, 2001 report, the Office medical adviser noted that he reviewed Dr. Medina's report of August 13, 2001, along with the other medical evidence of record. He advised that he was unable to find objective medical evidence in support of total disability or indications that appellant could not return to work with her previous physical limitations and restrictions. The Office medical adviser advised that appellant should be referred for a second opinion evaluation.

In a November 1, 2001 letter, the Office advised appellant of the Office medical adviser's findings and noted that she might want to share this information with her physician. Appellant was additionally informed that she would be scheduled for a second opinion evaluation.

Appellant returned to her light-duty work.<sup>3</sup>

On December 9, 2001 appellant filed another claim alleging that she sustained a recurrence of disability on November 14, 2001 due to her work-related conditions. She stopped work November 16, 2001.

The Office continued to receive medical reports from Dr. Medina stating that appellant was disabled. Results of objective testing were also received.

By letter dated June 13, 2002, the Office referred appellant, a statement of accepted facts, medical records and a list of specific questions to Dr. Leonard R. Smith, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a July 3, 2002 report, Dr. Smith noted appellant's history of injury and her medical history. Physical examination findings were presented. Dr. Smith advised that appellant's surgery had corrected the original disc degeneration and aggravation, and there was no evidence of any progression or clear objective evidence of radiculopathy. He noted that there were several other complicating factors during her period of treatment which were all nonemployment related. Dr. Smith opined that appellant's total disability ceased in 1999 and she reached maximum medical improvement. He

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<sup>3</sup> The record does not indicate exactly when appellant returned to her light-duty work.

further opined that appellant could perform her rehabilitation job description within her physical restrictions. Dr. Smith also stated that it did not appear that the additional walking distance to her workstation caused or aggravated the accepted work-related conditions, resulting in total disability.

The Office found a conflict in the medical opinion evidence between Dr. Medina and Dr. Smith regarding appellant's disability. By letter dated August 6, 2002, the Office referred appellant, a statement of accepted facts, medical records and a list of specific questions to Dr. Charles W. Mercier, a Board-certified orthopedic surgeon, for an impartial medical examination.

Dr. Mercier submitted an August 29, 2002 report which diagnosed an acute lumbosacral strain. He stated that he reviewed the statement of accepted facts and appellant's job description. Dr. Mercier noted that he had no records of an injury in April 2001. He reviewed appellant's complaint of increased back pain after walking on the job on May 30, 2001. Dr. Mercier noted that, on March 30, 2001, appellant's doctor had recommended that she be disabled through April 21, 2001. Dr. Mercier opined that there was no indication on appellant's multiple magnetic resonance imaging (MRI) scans of a continuing disabling low back condition. Her multiple electrodiagnostic testing was not medically indicated and only revealed pathology consistent with her old surgery. Dr. Mercier advised that the fact that she had to walk a short distance further in May 2001, did not support being off work for over one year. Dr. Mercier stated that, except for subjective pain, appellant's low back examination was normal and without muscle spasms. Appellant was neurologically intact. Her straight leg testing was contradictory, bilaterally indicating an element of false reporting to clinical testing. Appellant's x-rays of the lumbosacral spine reveal a solid fusion at L5-S1 with an incomplete but stable fusion at L4-5. No bony instability was found on motion views. There was no indication of foraminal stenosis at any level. Dr. Mercier concluded that appellant should be working at her regular job full time at maximum medical improvement with weight restrictions on the amount of pushing and lifting.

By decision dated September 16, 2002, the Office denied appellant's claims for recurrence of disability. The Office accorded determinative weight to the opinion of Dr. Mercier, selected as the impartial medical examiner.

The Board finds that appellant has failed to establish that she sustained recurrent periods of total disability beginning May 30 and November 16, 2001 due to her accepted employment injuries. Appellant alleged that sustained intermittent periods of total disability due to the effects of her work-related conditions beginning May 30 and November 16, 2001.

An employee returning to light duty or whose medical evidence shows the ability to perform light duty, has the burden of proof to establish a recurrence of temporary total disability by the weight of substantial, reliable and probative evidence and to show that he or she cannot perform the light duty.<sup>4</sup> As part of her burden, the employee must show a change in the nature

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<sup>4</sup> *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

and extent of the injury-related conditions or a change in the nature and extent of the light-duty requirements.<sup>5</sup>

Section 8123(a) of the Federal Employees' Compensation Act<sup>6</sup> in pertinent part, provides: “[I]f there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.”

In this case, the Office found a conflict in the medical opinion evidence between appellant's treating physician, Dr. Medina, who opined that appellant was disabled from performing the duties of her limited-duty position and Dr. Smith, a second opinion physician, who opined that appellant could perform the duties of her limited-duty position within the original restrictions. Consequently, the Office referred appellant to Dr. Mercier for an impartial medical examination. In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.<sup>7</sup>

Dr. Mercier provided a detailed report with a history of injury, review of medical records and findings on physical examination. In his report, he concluded that, for the period of disability claimed beginning May 30, 2001, none of the objective studies during that time denoted a continuing disabling low back problem and only revealed pathology consistent with her old surgery. The fact that she had to walk a short distance further in May 2001 did not justify being off work for over one year. Dr. Mercier found that, except for subjective pain, appellant's low back examination was normal and she was neurologically intact. The straight leg testing was contradictory, bilaterally indicating an element of false reporting to clinical testing. X-rays revealed a pathology consistent with her surgical procedure with no bony instability or indication of foraminal stenosis. Dr. Mercier advised that appellant was at maximum medical improvement and could return full time to her regular job with restrictions. As Dr. Mercier found no objective medical evidence to support continued disability or medical residuals due to her accepted condition, the Office properly denied her claims of a recurrence of disability. As such, appellant has failed to meet her burden of proof of establishing a recurrence of total disability for the claimed periods due to her employment-related injuries.

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<sup>5</sup> *Id.*

<sup>6</sup> 5 U.S.C. § 8123(a).

<sup>7</sup> *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

The September 16, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
February 27, 2003

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member